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Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT of the UNITED STATES

CURTIS A. PHANEUF, a single man,

Petitioner,

versus

THE GOVERNMENT OF INDONESIA, A FOREIGN STATE; THE REPUBLIC OF INDONESIA DEFENSE SECURITY COUNCIL, an agency or instrumentality of a foreign state; H. A. MAWARDI, Ambassador of the Republic of Indonesia,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William B. Blaser
William B. Blaser & Associates
4750 North Oracle Road, Suite 316
Tucson, AZ 85705
(520) 888-9195
Attorney for Petitioner

94PP

QUESTIONS PRESENTED

I. Was it error for the Ninth Circuit to not use all of the law of agency in a foreign sovereign immunities act case thereby creating the "Phaneuf Rule" based upon interpreting the legislative intent when the Supreme Court and other circuits use all of the law of agency in FSIA cases and when the Ninth Circuit uses all of the law of agency in other types of cases?

II. Was it error for the Ninth Circuit to create foreign policy by its decision not to use all of the law of agency in an FSIA case thereby limiting Phaneuf's, or any plaintiff's opportunity to prevail in an FSIA commercial activities case without an "admission" i.e., actual written (executive and/or legislative act) or other equivalent proof from the adverse government?

III. Was it error for the Ninth Circuit to create an absolute bar to any review of a foreign sovereign's activity which have an impact or effect in this country by limiting review of those activities to only agents with written (currently acknowledged by the sovereign) authority, i.e. situational authority, thereby granting absolute relief from all responsibilities for all other commercial activity?

IV. Was it error for the courts below to ignore the body of international law (adopted by Indonesia) regarding international promissory notes and the law of the place of signing (Syria) and payment (United States) as controlling?

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Opinion of the United States Court of Appeals for the Ninth Circuit in *Phaneuf v. The Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997), filed February 7, 1997, remanding the matter to the District Court for decision on the issue of authority. A-39.

Order in the United States District Court for the District of Arizona dated September 25, 1995, denying the Motion to Dismiss the Complaint in its entirety. A-1.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court of the District of Arizona was entered on August 17, 2001. The Petition for Rehearing and the Petition for Rehearing *En Banc* were denied October 25, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date pursuant to 28 U.S.C. Section 2102(c) and Rule 13(1) of the Supreme Court Rules.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1251(b)(1).

This court also has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

The Appellate Court of the Ninth Circuit had jurisdiction over a final decision of the District Court for the District of Arizona pursuant to 28 U.S.C. Section 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article III, Section 2:

> "The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; . . .
>
> . . . [T]he supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

United States Constitution, Amendment XIV, Section 1

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the law."

The Foreign Sovereign Immunities Act, 28 U.S.C. Section 1602, etc.

28 U.S.C. Section 1605(a)(2):

> "(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case–
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;"

STATEMENT OF THE CASE

LIST OF PLAYERS

1. **Suharto** – General Suharto – "Strong-Man" President for 32 years in Indonesia.

2. **Ibnu** - General Ibnu Hartomo - Brother-in-law of Suharto and Director of the NDSC. Brought to the NDSC to raise money.
3. **Mawardi** - Ambassador Chalid Mawardi - Indonesia's Ambassador Extraordinary, Plenipotentiary to Syria.
4. **Achmad** - General Achmad Wiranatakusumah - he was the Secretary General of the NDSC.
5. **Dr. G.** - Dr. Sudargo Guatama - the live witness presented by Indonesia on Indonesian law.
6. **Komar** - Dr. Komar - dead maritime law expert used by Indonesia in their declarations as an "expert" on Indonesian law.
7. **Hage** - Dr. Edward Hage - a lawyer/notary in Indonesia. He signed documents with Mawardi and Sugito (a member of the High Court of Jakarta [their Court of Appeals], a division of the Ministry of Justice) confirming the NDSC's right, under Indonesian Law, to borrow from foreign countries..
8. **Walid** - Walid Al-Movalem, Ambassador for Syrian Arab Republic to the United States, creator/signatory of August 22, 1997 letter re: Syrian involvement with the IPNs.
9. **Chaar** - Dr. Naim Chaar - Director - Central Bank of Syria, a third party to the signing ceremony.
10. **IPN** - Indonesian Promissory Note, the promissory notes which are the basis of this claim.
11. **NDSC** - National Defense Security Council - a council headed by the President of Indonesia,

created by the President because . . . "the President needs to be assisted by a state institution assigned to draft the said supreme policy and to assure the performance of effective and continuous coordination on all structures needed to decide and implement the said supreme policy." The NDSC consisted of: the President; Vice President; Minister of Foreign Affairs; Minister of State for Economy, Finance, Industry; Minister of Defense; Commander of the Armed Forces; plus various high ranking officials of the Indonesian Government and Military.

12. **WTN** - Windsor Trust Notes - the notes purchased by Indonesia. These were the notes acquired when the IPNs were created and delivered.
13. **Dewan** - Indonesia's Parliament - meets at least one time a year.
14. **Majelis** - A Supreme Council who meets every five years and appoints the President.

STATEMENT OF THE CASE

NARRATIVE

In 1984 President Suharto (Suharto) was informed of an opportunity to make money for the Country of Indonesia regarding Windsor Trust Notes (WTN). He turned over the opportunity to his brother-in-law, Ibnu Hartomo (Ibnu), who was a member of the Presidential Council and the NDSC. Ibnu was a member of the NDSC for the purpose of obtaining funds. Ibnu proceeded, with the assistance of multiple parts of the Indonesian Government, to create and issue the IPNs. Ibnu also had a written authorization from Achmad, which written authorization was notarized, and also confirmed as official/governmental by Ambassador Mawardi (Indonesia claims this written authorization to be a forgery and/or that Achmad had no authority to give authority).

A signing ceremony occurred in Damascus, Syria with the Central Bank of Syria involved as a third party. After the signing, the IPNs were transferred to Hassan Zubaidi, a Lebanese businessman. Zubaidi then transferred some of the Notes into the stream of commerce, resulting in the IPN notes that are the basis of this case. Prior to this case being filed, a second transaction occurred between Indonesia and the Government of Syria, again involving the Central Bank of Syria as a third party and the WTN/IPNs in 1988 and 1989, as described in the letters and affidavits from Chaar and Walid.

A Complaint was filed for breach of contract in October of 1994 against the Government of Indonesia, the NDSC, and Mawardi, as Ambassador, in his official capacity since Mawardi signed the IPNs stating that the IPNs were "official, governmental". The breach was for nonpayment of bearer Indonesian Promissory Notes (the IPNs). Proper service was obtained upon Indonesia. An attempt at a prejudgment attachment was made to try and secure payment from Indonesia

(Phaneuf attempted to attach an Indonesian 747). The Motion was denied by the District Court

Indonesia filed a 12(b)(6) Motion to Dismiss, and their Answer. Indonesia filed multiple declarations to support their position. An Opposition to the Motion to Dismiss was filed, along with extensive documentation as to the nature of the Indonesian Government, and the nature of this transaction. Ultimately, a hearing was held in the District Court regarding the Motion to Dismiss. Phaneuf argued at that hearing that the question regarding the Motion to Dismiss, and the merits of this case, were so intertwined that one could not be separated from the other. The issue of authority for the purpose of the jurisdictional question under the FSIA, is the same issue of authority on the merits. If there is authority for jurisdiction, that issue will have been already decided as the law of the case on the merits.

The District Court denied Indonesia's Motion to Dismiss, resulting in the first appeal. The Ninth Circuit Court remanded on the sole issue of authority, stating that since Phaneuf had provided proof of the "commercial activity exception" applying, Indonesia bears the burden of proving, by a preponderance of the evidence, that the exception does not apply. *Phaneuf v. Indonesia, 106 F.3d @ 306.*

The authority issue on remand to the District Court after the first appeal was very limited, i.e. express or actual authority only would suffice for the

Ninth Circuit. Under those circumstances, the District Court could not use all of the Law of Agency, but only a small section of the Law of Agency applied.

The Law of Agency discusses authority (the express authority required by the Ninth Circuit Court herein), apparent authority, alter ego, and ratification, as several means of proving authority. All are sufficient legal authority to hold a government responsible for acts, they are just different ways to get there.

On Remand, Opening and Reply Memorandums on fact and law were prepared and filed. Rule 44.1 was applied to the evidence. Insofar as the information provided by Indonesia was mostly by declarations, a great deal of information was also provided by Phaneuf on credibility, i.e. if there is proof that the declarants are not being truthful, the declarations should be disregarded. Phaneuf also filed six supplementations to the timeline in the original Memorandum On Remand Re Authority. The notices of supplemental exhibits drew Motions to Strike from Indonesia. These Motions to Strike were denied, but the file continued to grow because of the maneuvering of Indonesia on these pretrial matters.

An evidentiary hearing was held with one live witness appearing for Indonesia. This was the only "discovery" in this pretrial (Motion to Dismiss) phase of the case. That witness was Dr. Guatama (Dr. G.).[1]

Dr. G. testified in support of Indonesia's claim that Presidential Decree 59/1972 is controlling in Indonesia and precludes authority on behalf of the NDSC to issue the IPNs. Dr. G. stated very clearly how a Presidential Decree becomes a law in Indonesia. Dr. G. also gave insight into the nature of the Government of Indonesia.

The District Court found in favor of Indonesia and granted the Motion to Dismiss on March 31, 1999. The District Court in that opinion stated that: "Indonesia follows the civil law tradition, thus, law exists only to the extent it is published in the form of statutes and decrees." Phaneuf moved for relief from the Court's Order granting the Motion to Dismiss pursuant to Rule 59(a) Fed R. Civ. P., a Motion for New Trial, and Rule 1.10 Rules of Practice of the United States District Court for the District of Arizona, a Motion for Reconsideration. The motion was timely filed on April 9, 1999. A basis for the motion was that 59/1972 is not the "law" of Indonesia in that the Decree 59/1972 was never approved by the Dewan and published in the official Gazette as required in Indonesia for a decree to become law.

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[1] While Dr. G. was called to testify as an expert for Indonesia in this IPN case, two things about his testimony are striking – one, he was never shown Indonesia's file, or any documents from Indonesia on the IPNs; two, he never called any of the decrees (used by Indonesia) a law (always a decree) – a very careful use of language! If he did not think they are the law, why should anyone else? Moreover, nowhere on the record is there a statement where Dr. G. was accepted as an expert by the Court.

The request for relief was filed under Rule 59(a) in part because this case was to be a trial to the Court, with a jury never having been requested. Rule 59(a) states in an action tried without a jury, the Court may open the judgment, take additional testimony, amend or make new findings of fact . . . as in a Rule 59(e) Motion, altering or amending the judgment.

Phaneuf considered the hearing on the Motion to Dismiss his trial, due to the intertwining of the merits and the procedure in this case. If there is authority for the issue of jurisdiction, there is authority on all issues for the merits. Once authority is established, the IPNs are bearer in form. The IPNs were mature in 1993. The IPNs remain unpaid. Once the issue of authority is established, the remaining issue is: . . . not if . . . but how much?

Additional memos and exhibits were presented by Phaneuf which showed: that 59/1972 was not the law of Indonesia; that 59/1972 did not apply to the NDSC; and/or that even if it did apply, it was followed completely under the facts of the case. It was also shown that Indonesia has a pattern for alternative financing that routinely circumvented the "law" as a normal commercial and/or governmental practice. The IPNs followed and/or quite possibly created this alternative practice of avoiding the law. This avoidance or unwritten part of the law is a part of the

Fundamental Law of Indonesia as discussed and acknowledged in the Indonesian Constitution. However, the Ninth Circuit eliminated consideration of these issues in its decision in *Phaneuf v. Indonesia, supra.*

On February 4, 2000, the District Court, without further hearings, found in favor of Indonesia, dismissing the case, with prejudice. The Court also denied the Motion for New Trial and/or Motion for Reconsideration. A timely appeal from the granting of the Motion to Dismiss, and the denial of the Motions was filed on February 28, 2000.

The Ninth Circuit Court decided this matter without the benefit of oral argument. See Order (A-56). The Ninth Circuit Court decided to affirm the District Court Order. The Ninth Circuit declined to reconsider their earlier, narrow ruling on the authority issue, relying on the law of the case doctrine, and ignoring the manifest injustice caused by their prior, narrow opinion. A Motion for Rehearing and/or Rehearing *En Banc* was filed and denied. This petition, timely filed, followed.

REASONS FOR GRANTING THE WRIT

I. RULE 10

Rule 10 of the Rules for the Supreme Court set forth several grounds for granting a Writ of Certiorari. It appears that the Ninth Circuit is on the wrong side of at least four parts of Rule 10, two parts in (a), and two parts in (c), as more fully set forth herein below.

A. The Ninth Circuit's decision is in conflict with the United States Supreme Court.

Rule 10(c) of the Rules of the Supreme Court is concerned with a circuit court deciding an important federal question in a way that conflicts with a relevant decision of the Supreme Court. The Ninth Circuit by limiting Phaneuf, or any plaintiff under the "Phaneuf Rule"[2], to actual authority has decided an important federal question contrary to the decision of the United States Supreme Court in *First National City Bank v. Banco Para El Commercio Exterior De Cuba*, 462 U.S. 611 1983 (hereinafter "*Bancec*"). In *Bancec*, Cuba through other entities seized assets of City Bank. It was determined looking at the issues that Cuba had received the benefits of the entities' actions and in effect ratified the action sufficiently to be held responsible. As such, Cuba, by using the ratification aspects of agency, was found responsible under the FSIA and the case proceeded forwarded to a decision thereafter.

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[2] ***Adler v. Federal Republic of Nigeria*, 219 F.3d 869 (9th Cir. 2000) is a more recent FSIA case in the Ninth Circuit. In Footnote 5, Page 874 of the opinion of the Ninth Circuit discusses "Phaneuf's Rule". The *Adler* court states that a contract for an illegal purpose, i.e. a fraud, can still be commercial in nature, citing to *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). It should be noted that Phaneuf also involved an alleged fraud. In addition, one must question if this decision by the Ninth Circuit is also in conflict with *Weltover*. See Argument II herein, p. 19.**

B. The Ninth Circuit has made a decision regarding an important question of federal law that should be made by the Supreme Court.

Rule 10(c) of the Supreme Court Rules, also discusses when a circuit decides an important question of federal law that has not been decided but should be decided by the Supreme Court. The Ninth Circuit herein, by the *Phaneuf* decision, and by establishing the "Phaneuf Rule", has determined that only actual authority will suffice in an FSIA case. This is not stated in the statutes as passed by Congress. Congress does not limit what aspect of the law of agency is to be applied in an FSIA context. Nor, has the Supreme Court passed on such an issue. Such an issue should be settled by this Court insofar as it is an issue of national importance.

Most of the cases involving FSIA may result from actions at or near the coastline, where most foreign commerce occurs. But it can apply to any jurisdiction where a commercial act causes an effect in the United States. Accordingly, the Ninth Circuit should not establish the "Phaneuf Rule" on authority. If the "Phaneuf Rule" exists, it may effectively eliminate the United States government from prosecuting racketeering and/or state sponsored activities without a currently acknowledged, written document giving actual authority to the agent. The Supreme Court should decide whether all of the law of agency, only part of the law of agency, or something in between should apply in determining jurisdictional questions in an FSIA setting.

C. The Ninth Circuit's decision is in conflict with decisions from other circuit courts.

Rule 10(a) discusses when a circuit court decides an important question of federal law in conflict with a decision or decisions of other circuit courts on the same important question. The Ninth Circuit in *Phaneuf*, and by creating the "Phaneuf Rule", has decided such an important question in conflict with other circuits. In the *Phaneuf v. Indonesia* opinion, *supra*, the Ninth Circuit indicated that their opinion was in conflict with the Second Circuit *First Fidelity Bank v. The Government of Antigua and Barbuda - Permanent Mission* 877 F.2d 189 (1989 2d Cir.). In *Barbuda*, the Second Circuit considered apparent authority, as a ground on which to find jurisdiction and apply FSIA to the facts of that case.

In addition to the conflict with the Second Circuit, the Ninth Circuit is in conflict with the United States Court of Appeals for the District of Columbia Circuit and its decision in *McKesson Corporation v. Islamic Republic of Iran* 52 F.3d 346 (1995 D.C. Cir.)

wherein "alter ego" seems to have been applied to the agency concept of an FSIA case.

It should be noted that the prior cases of the United States Supreme Court, and the Second and D.C. Circuits were cases followed by other courts, i.e. those other courts used all of the law of agency when dealing with foreign sovereigns. *Republic of Rwanda v. Uwimana* 255 B.R. 669 (D.Md. 2000), *Momen v. United States* 946 F. Supp. 196 (N.D.N.Y. 1996). The Ninth Circuit, having created the "Phaneuf Rule", may also be followed by other courts creating a conflict in the law to be applied to the facts of a case completely depending on the choice of forum. While there may be, and probably are other cases in conflict with the Ninth's opinion and the "Phaneuf Rule", it would seem that conflicting with these three cases, without more, would require this Court's intervention to resolve the conflict.

D. The Ninth Circuit's decision unreasonably limiting the application of the law of agency is a departure from the usual course of judicial proceedings such that due process is being denied, requiring the Supreme Court to exercise its supervisory power.

Rule 10(a) also states that when a circuit court has so far departed from an acceptable and usual course of judicial proceedings, and has limited itself and/or the district court to that departure, that it may call for an exercise of this Court's supervisory power. The Ninth Circuit, by taking upon itself to create the "Phaneuf Rule", and by limiting the district court to apply only a small part of the law of agency in an FSIA case, has engaged in a departure from an acceptable and usual course of judicial proceedings such that the supervisory power of this Court must be used to correct the error below.

The Ninth Circuit has created a narrow rule within the Foreign Sovereign Immunities Act using only authority (actual or express authority) as the basis for finding commercial activity to be the commercial activity of the sovereign. In no other context is the law of agency limited when trying to answer a question of authority. The law of agency, all of it, was created by the courts to assist in answering questions of authority. To throw away eighty percent or more of the law of agency is a substantial departure from due process. This substantial departure also created a situation where manifest injustice can now exist. The Ninth Circuit could have dealt with and corrected this situation. The Ninth Circuit, *En Banc*, could have revisited their earlier decision to eliminate the manifest injustice of ignoring most of the law of agency, and also eliminate the conflict with other cases. Instead, the Ninth Circuit hid behind the law of the case, ignoring all of the problems created by their narrow decision. While the Ninth Circuit would not reconsider because of law of the case, the Supreme Court is not so limited, or any court involved in appellate review. *LaShawn A. v. Barry*, 69 F.3d 556, 560 (D.C. Cir. 1995). As discussed in *LaShawn*, the Ninth Circuit (and the Second) has held that law of the case did not bar a district court from reconsidering its own orders, yet the Ninth Circuit will not reconsider its opinion. This is especially troublesome in light of the statement that "subject matter jurisdiction, because of its intrinsic importance to the judicial power of the federal courts, is particularly suitable for reconsideration." *LaShawn, Ibid.* @ 561.

Moreover, the Ninth Circuit, by its departure from the acceptable and usual course of judicial proceedings, is creating foreign policy limiting Phaneuf's, or any plaintiff's opportunity, to prevail in an FSIA commercial activities case. Without current approval, i.e. some actual written document from the legislature and/or from the executive, or other equivalent proof from the adverse government, there is no opportunity to proceed. A government, with the Ninth Circuit's departure from the law, can, after the fact, say there was no authority, and that is the end of the analysis under the Ninth Circuit's "Phaneuf Rule". Foreign governments would be allowed to manipulate the court system just by stating there was no authority notwithstanding the proof to the contrary (such as Phaneuf provided herein).

The Ninth Circuit, by its departure from the acceptable and usual course of judicial proceedings, has created an absolute bar to any review of a foreign sovereign's activities if the foreign sovereign will not **currently** acknowledge authority. While Indonesia has always operated, as has been shown in the courts below, from a situational truth perspective, the situational authority created by the Ninth Circuit grants absolute relief to irresponsible governments for their commercial activities. Not only will Phaneuf be denied due process, but any plaintiff, no matter what the proof, will be denied access to the courts if the government simply states a person did not have authority. The law of agency was created to establish a framework within which to determine authority. The Ninth Circuit, by its decision, has gutted the law of agency in any FSIA case.

II. The Ninth Circuit's decision also ignores and/or destroys international law regarding promissory notes.

In addition to changing foreign policy and/or international commercial relations as set forth above, the Ninth Circuit by its decision ignores and/or destroys the body of international law (adopted by Indonesia and other countries) regarding international promissory notes. See Round-Table Conference Agreement Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia, Dec. 2, 1949, art. 4, § 1 and art. 5, § 1, 69 U.N.T.S 1950, (A-58), and *Digest of Commercial Laws of the World*, K1005.4, D54, 1966, vol. 4, p. 67, § 17, (A-60). The international treaties, signed by Indonesia, provide that the law of the place of signing (Syria) or payment (United States) is controlling, not Indonesia. See Convention for the Settlement of Certain Conflicts of Law in Connection With Bills of Exchange and Promissory Notes, June 7, 1930, art. 4, ____ L.N.T.S. 1934, (A-61). Also by international treaties, promissory notes (the IPNs) are treated like bills of exchange. See

Uniform Law on Bills of Exchange and Promissory Notes, art. 20, ____ L.N.T.S. 1934, (A-62).

By eliminating most of the law of agency from applying to an FSIA situation, the Ninth Circuit is changing international law to allow the place of creation, and statements by the adverse government, to control access to the courts. While the intent may have been to limit Phaneuf only (thus the memorandum decision), the impact because of the first decision may be far wider. See *The American Journal of International Law*, Vol. 91, No. 4 (1977). (A-60). As asked at the end of the article, does *Weltover* have any meaning if a government can obtain immunity from suit by establishing a lack of authority under its own law any time a financial transaction proves to be inconvenient? The Ninth Circuit, in its *Phaneuf* decisions, says *Weltover* is dead.

III. The Ninth Circuit's decision denies equal protection of the law to anybody in the Ninth Circuit who files an FSIA case.

The Constitution, Amendment 14, provides for both due process, as mentioned above, and equal protection of the laws. The Ninth Circuit, by its decision in creating the "Phaneuf Rule", has created a situation where there is unequal protection of the law in the United States. If you are within the Second Circuit, the D.C. Circuit, or a circuit that follows the decisions of the Supreme Court, you are going to be able to apply ratification, alter ego, and/or apparent authority (at a minimum) to determine authority questions under the FSIA. However, if you are in the Ninth Circuit, whether by birth or mere happenstance, the law of agency will not be applied to your case. Only authority (actual or express authority) will be considered. The Constitution requires equal protection. While that may not be perfect, it must be fair. The Ninth Circuit's use of the "Phaneuf Rule" is unfair, resulting in unequal protection of the law.

IV. The Supreme Court has original, concurrent jurisdiction to decide this case.

Finally, the Supreme Court has concurrent jurisdiction to originally hear any case involving an ambassador. Ambassador Mawardi was sued in his official capacity insofar as he authenticated all of the notes, the written authorization, and other documents as being "official/governmental" documents. He did that in Damascus, Syria, with the Syrian Government, at the official signing ceremony when the IPNs were traded for the WTNs. Being sued in his official capacity, this court may decide to exercise its original jurisdiction.

If the Supreme Court does choose to act in that fashion, factual questions would also be presented. Among them, would be the question as to whether Ibnu was an agent or actually was the government itself. Additionally, Indonesia, through its lawyers, once claimed that Indonesian law controls United States law. Those same lawyers now claim that

Indonesian law is the same as New York law, North Carolina law, United States law, with all being the same, presumably applying all of the law of agency. It would seem that only the Ninth Circuit does not know, thus the Ninth Circuit's narrow, conflicting decision.

CONCLUSION

To solve the problems created by the Ninth Circuit and their opinions regarding the "Phaneuf Rule", the Supreme Court should grant this writ.

Respectfully submitted,

Wm. B. Blaser

William B. Blaser
Counsel of Record
WILLIAM B. BLASER
& ASSOCIATES
4750 North Oracle Road, Suite 316
Tucson, AZ 85705
(520) 888-9195

APPENDIX

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DISTRICT OF ARIZONA
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CURTIS A. PHANEUF)
) CV-94-746-TUC
WDB
Plaintiff,)
) ORDER
v.)
)
THE REPUBLIC OF INDONESIA,)
a foreign state, the NATIONAL)
DEFENSE SECURITY COUNCIL)
OF THE REPUBLIC OF)
INDONESIA - JAKARTA, an)
agency or instrumentality of a)
foreign state, H.A. CHALID)
MAWARDI, Ambassador of)
Indonesia,)
)
Defendants.)
)

This action was brought to collect on certain promissory notes purportedly issued on behalf of the Indonesian government. These notes, issued in 1985, have face values of up to twenty-five million dollars ($25,000,000). It is unclear exactly how many notes Plaintiff possesses, although some of the papers indicate that seven notes are at issue. Defendants include: (1) the Republic of Indonesia; (2) the National Defense Security Council (of the Republic of Indonesia), Jakarta, ("NDSC"); and (3) H.A. Chalid Mawardi, Ambassador of Indonesia to Syria (apparently former). Mawardi was sued in his official capacity. Pending before the Court is Defendants' February 15, 1995 "Motion to Dismiss the Complaint in its Entirety." A hearing was held on September 22, 1995. The Court will deny the Motion for the following reasons.

BACKGROUND

Plaintiff holds certain promissory notes, at least some of which have a face value of twenty-five million dollars. Both Parties have submitted numerous documents, including newspaper and magazine articles, that shed light on how the notes may have come into being. Sometime in 1985, certain members of the NDSC may have attempted to borrow money abroad and were dealing with a man named "Hassan Zubaidi", a Beirut-based financier. The NDSC officials exchanged their notes for notes issued by Zubaidi, which turned out to be worthless. In short, what appears to have happened is the NDSC officials were duped in to turning over notes to Zubaidi, which on their face contained no restrictions, but which were never funded. Zubaidi then traded the notes as if they were good. There have been criminal prosecutions arising from these (or similar) notes.

Potentially, seven (7) notes are at issue. From what can be gathered from the documents submitted, these notes originated in Syria and the deal was facilitated by a "Mr. Hans Beeg," a German lawyer, who supposedly was handed the notes personally by Zubaidi. Beeg then transferred the notes to an account in Hong Kong in the name of the "Panorama Foundation," which purportedly paid $70,000,000 for the notes. At least one of the notes eventually was delivered to Plaintiff by a "Sir Warren Chang," the Chairman of the Panorama Foundation. After attempting to collect on the notes(s), Plaintiff filed this lawsuit.

ANALYSIS

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"), provides the sole basis of jurisdiction over a foreign state in this country. Saudi Arabia v. Nelson, ___ U.S.____, 113 S. Ct. 1471, 1476 (1993). Under the FSIA, a foreign state is presumptively immune from the jurisdiction of the United States unless one of the FSIA's statutory exceptions apply. Id. As a threshold matter, therefore, the Court must determine whether the FSIA provides subject matter jurisdiction. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 706 (9th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1812 (1993).

For immunity to apply, however, Defendants must make out a *prima facie* case that they are protected by the FSIA -- that is, they are (1) a sovereign state and (2) that the acts complained of arise out of a public act. See id. at 708 n.9. This raises a presumption that Defendants are protected by immunity. Id. Plaintiff is then obligated to come forward and allege that a statutory exception applies. Id. If the allegations in the Complaint, accepted as true, and the uncontroverted evidence presented bring Plaintiff's claims within an FSIA exception, the burden then shifts to Defendants to prove, by a preponderance of the evidence, that any relevant exception does not apply. Id. at 707-08 & n.9, 712-13.

Plaintiff, in his Complaint and in his opposition, invokes the commercial activity exception, specifically, the third clause of §.1605(a)(2), which reads:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or the States in any case --
>
> . . .
>
> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity *of the foreign state* elsewhere and that act causes a direct effect in the United States.
>
> . . .

(Emphasis added); see also Complaint ¶ VII, IX, XIII. Plaintiff's allegation that 28 U S.C. § 1605(a)(2) applies is sufficient, without more, to require Defendants to respond and show that the exception raised does not apply. Siderman de Blake, 965 F.2d at 708 n.9. In any event, Defendants agree that the issuance of the bonds was a commercial act that would invoke the exception. See Defendants' Memorandum of Points and Authorities at 8.

Although the Parties apparently agree about the commercial nature of the act, there is strong disagreement regarding *who* is responsible. In attempting to meet their burden to show that the commercial activity exception does not apply, Defendants argue that the acts were not those of the sovereign and, therefore, there was no "commercial activity of the *foreign state.*" 28 U.S.C. § 1605(a)(2). If true, however, this argument necessarily defeats any contention that the FSIA applies in the first place. This is so because Defendants are immune only for their public or sovereign acts. See Siderman de Blake, 965 F.2d at 708 n.9. The logic of Defendants' position, therefore, is inconsistent. .

Defendants, thus, have not established a *prima facie* case that the FSIA applies. Defendants cannot consistently argue that they are entitled to immunity (as a foreign sovereign for their sovereign acts) to invoke the FSIA and, at the same time, argue that the acts alleged were not sovereign so as to defeat its exceptions. Instead, what Defendants are really arguing is that they are not responsible for the notes because they didn't issue them. The Court finds that such an argument more clearly rests on the merits of the claims, rather than on jurisdiction. For now, the Court finds that it has subject matter jurisdiction, although discovery might provide a sufficient basis to revisit the issue later. See Siderman de Blake, 965 F.2d at 713.

As to the remaining arguments raised, the Court will deny them at this time. The Court finds that service was adequate. As to venue, *forum non conveniens*, and standing, the Court believes that further development of the record is necessary to fairly resolve the arguments. As to Defendants' contention that Plaintiff failed to state a claim, the Court believes that the pleadings do not conclusively resolve that issue and will deny the argument on that basis.

Accordingly, Defendants' "Motion to Dismiss the Complaint in its Entirety" is DENIED.

DATED this 25 day of Sept., 1995.

s/William D. Browning
WILLIAM D. BROWNING
UNITED STATES DISTRICT COURT JUDGE

√ Filed __Lodged
__Received __Copy

March 31, 1999

CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
By: s/________________Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CURTIS A. PHANEUF)
) CV -94-746-TUC
WDB
Plaintiff,)
v.) ORDER
)
THE REPUBLIC OF INDONESIA,)
a foreign state, the NATIONAL)
DEFENSE SECURITY COUNCIL)
OF THE REPUBLIC OF)
INDONESIA – JAKARTA, an)
agency or instrumentality of)
a foreign state, H.A. CHALID)
MAWARDI, Ambassador of)
Indonesia,)
)
Defendants.)
)

Pending before the Court are Defendants' October 17, 1997 Motion to Dismiss and Plaintiff's October 17, 1997 Memorandum on Remand Regarding Authority. The motions are fully briefed and a hearing was held before the Honorable Judge William. D. Browning on November 19, 1998

I. BACKGROUND.

This action, based on breach of contract, is brought to collect on certain promissory notes purportedly issued on behalf of the Indonesian government. These notes. issued in 1985, each have a face value of up to twenty-five million dollars ($25,000,000). Plaintiff possesses seven notes: 219/AA, 220/AA, 279/AA, 282/AA, 283/AA. 284/AA, and 285/AA. These notes were issued, along with approximately 500 other promissory notes valued at over three billion dollars, by several then-members of the National Defense Security Council of the Republic of Indonesia ("NDSC"). A copy of a note submitted to the Court shows that it (1) was issued by the NDSC; (2) was signed by Dr. Ibnu Hartomo (Deputy of Development for the NDSC) and Mr. S. Soebagyo Soedewo (Deputy of Long Term Planning for the NDSC); (3) was "confirmed" as "Official/Governmental" by HA. Chalid Mawardi, the Indonesian ambassador to Syria (now former); (4) was issued to the "Central Establishment for Trade and Investment - Beirut And Or Their Bearer without any Recourse"; (5) matured on May 15, 1993, but allegedly was extended for one year; and (6) was to be paid in New York in United States currency. In November of

1985, defendant Mawardi, then Indonesia's ambassador to Syria, participated in a signing ceremony in Damascus. At that ceremony Mawardi purportedly confirmed that Hartomo represented the Indonesian government and the NDSC notes were "Official/Governmental." The principal maker of the notes, Dr. Ibnu Hartomo, President S. Suharto's brother-in-law, traded the NDSC notes for promissory notes issued by Hassan Zubaidi, a Syrian based financier. The notes issued by Zubaidi were later discovered to be worthless.

The Republic of Indonesia alleges that it did not know about the NDSC notes until late 1985, at which time it determined that they were not properly authorized and were, thus, invalid under Indonesian law. In January 1986, the NDSC's Secretary General informed Bank Indonesia that neither the NDSC nor any of its officials had authority to issue promissory notes and that the NDSC notes were invalid. (Zarkaski Aff. ¶ 9-13, (2/15/95 Doc. #25)). In April 1987, the NDSC issued a press release that disavowed NDSC responsibility for the notes, saying that the responsibility lay with the persons who signed the notes. *Id.* Dr. Ibnu Hartomo has filed an affidavit stating that the NDSC and officials of the NDSC did not have actual authority to issue debt on behalf of the NDSC or the Republic of Indonesia. (Ex. A Defs' 10/17/97 Mot. to Dismiss, Doc. #61; Ex. #8 Hr'g 11/8/98). Furthermore, Hartomo states in his affidavit that he knew he lacked actual authority when he signed the notes. *Id.* Bank Indonesia has continuously refused to honor the notes.

Defendants include: (1) the Republic of Indonesia; (2) the National Defense Security Council (of the Republic of Indonesia), Jakarta; and (3) H.A. Chalid Mawardi, the (former) Ambassador of Indonesia to Syria.

In 1987. the Panorama Foundation bought the seven notes at issue. From what can be gathered from the documents submitted the transfer of the notes at issue was facilitated by a Mr. Hans Beeg, a German lawyer, who supposedly was handed the notes personally by Zubaidi. Beeg then transferred the notes to an account in Hong Kong in the name of the Panorama Foundation, which purportedly paid seventy million dollars ($70,000,000) for the notes. Confirmation of receiving the seventy million dollars for the notes was made by Mr. Hans Beeg on May 28, 1987. (Ex #9 to Pl's 12/15/94 Hr'g Mem., Doc. #11). The seven notes were delivered to Plaintiff by a Sir Warren Chang, Chairman of the Panorama Foundation. Plaintiff brought this action to enforce payment on the notes in his possession.

On February 15, 1995, Defendants filed a motion to dismiss based on lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). On September 25, 1995. the Court denied the Defendants' motion to dismiss, finding that Defendants failed to establish a *prima facie* case that the FSIA applied because Defendants did not establish that there was a public act. The September 25, 1995 Order also stated that "as to venue, *forum non conveniens*, and standing, the Court believes that further development of the record is necessary to fairly resolve the arguments."

Defendants appealed contending that the district court erred in three ways: (1) Defendants had established a *prima facie* case of immunity under FSIA, (2) the commercial activity exception to FSIA does not apply to Plaintiff's claim, and (3) venue is improper in the District of Arizona. The Ninth Circuit did not review the district courts refusal to dismiss for lack of venue because they lacked jurisdiction to do so. *Phaneuf v Republic of Indonesia*, 106 F.3d 302. 304 (9th Cir. 1997). The Ninth Circuit reversed the district court and held that Indonesia and NDSC had established a *prima facie* case of immunity under FSIA. *Phaneuf*, 106 F.3d at 306, 308. In addition, the Ninth Circuit held that an agent of a foreign state must have acted with actual authority for a plaintiff to invoke the commercial exception to FSIA's immunity against a foreign state. *Id.* The case was remanded on two issues: (1) were Mawardi's actions within the scope of his authority entitling him to immunity under FSIA, and (2) does the commercial activity exception apply to the Defendants. *Phaneuf*, 106 F.3d 302.

On July 7, 1997, the Court issued a scheduling order allowing the parties to file simultaneous memorandum on the issue of jurisdiction. Plaintiff titled his memorandum as Memorandum on Remand Regarding Authority and Defendants titled theirs as a Motion to Dismiss. In addition, Defendants have filed three motions to strike which the Court denied on

September 30, 1998 pursuant to Rule 44.1 of the Federal Rules of Civil Procedure.

II. DEFENDANTS' MOTION TO DISMISS

The Law of the Case

This case comes before the Court on remand from the Ninth Circuit. *Phaneuf* 106 F.3d 302. FSIA, codified at 28 U.S.C.§ 1303(a), provides the sole basis of subject matter jurisdiction over suits involving foreign states and their agencies and instrumentalities. *Id.* at 304. A foreign state must only prove that it qualifies as a "foreign state" in order to be immune from jurisdiction of the courts of the United States. *Id.* at 305-06. There is no requirement that a foreign state demonstrate that the Plaintiff's claim arose from a public act. *Id.* "FSIA dictates that a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607'". *Phaneuf,* 106 F.3d at 305 (citing 28 U.S.C.§ 1604; *Compania Mexicana de Aviacion v. United States Dist. Court,* 859 F.2d 1354, 1359 (9th Cir. 1988)). A foreign state includes political subdivisions and agencies or instrumentalities of a foreign state. *Phaneuf* 106 F.3d at 306 (citing 28 U.S.C § 1603(b)). "The Republic of Indonesia is a foreign state and the NDSC meets the definition of an 'agency or instrumentality' of a foreign state." *Phaneuf,* 106 F.3d at 306 n. 1. Thus, Defendants, with the exception of Mawardi, have established a *prima facie* case of sovereign immunity. *Phaneuf,* 106 F.3d at 306.

FSIA only applies to a foreign official acting in an official capacity. *Id.* Therefore, Mawardi is only entitled to immunity if he was acting in an official capacity, not if he was acting beyond the scope of his official authority. *Id.* The Ninth Circuit remanded the issue of whether Mawardi's actions were within the scope of his authority, entitling him to the presumption of immunity under the FSIA. *Id.* Because Mawardi was sued only in his official capacity, if the Court finds that he was acting outside the scope of his authority there is no official capacity liability and he should be dismissed from the action. In addition, the parties have stipulated that the only issue before the Court is whether the Defendants acted with actual authority and they did not address the issue of Mawardi's actions separately. This is appropriate because if Mawardi was acting with actual authority he would be protected by FSIA to the same degree as the other defendants. Filing suits against a government official in official capacity is equivalent to filing suit against the government itself. *Monell v. New York City Dept. Of Social Sevices,* 4365 U.S. 658, 690 n.55 (1978). Thus, joining Mawardi in his official capacity was superfluous .

The Ninth Circuit established the law of the case to be: (1) Indonesia and the NDSC established a *prima facie* case of immunity under the FSIA and the burden of production shifted to Plaintiff to offer evidence that an exception applies, (2) Plaintiff offered evidence that the commercial activity exception applies, thus, (3) Indonesia and the NDSC bear the burden of proving by a preponderance of the evidence that the exception does not apply. *Phaneuf* 106 F.3d at 307. Under the commercial activity exception a foreign state is not immune from the jurisdiction of courts of the United States in any case in which the claim is based upon certain types of commercial activity of the foreign state which causes an effect in the United States. See 28 U.S.C. § 1605(a)(2). The issuance of sovereign debt is a commercial act which falls under this exception. *Phaneuf* 106 F.3d at 307. However, the commercial activity exception applies only if the commercial acts are those of the foreign state and "Defendants should be permitted to argue against the application of the exception based on the fact that. they did not act." *Id.* at 306. The Ninth Circuit held that the commercial exception only applies when agents have acted with actual authority. *Phaneuf*, 106 F.3d at 308 (contradicting the Second Circuit which held, in *First Fidelity Bank. N.A. v. Government of Antigua & Barbuda -- Permanent Mission*, 877 F2d 189 (2d Cir. 1998), that apparent authority was sufficient). "Because a foreign state acts through its agents, an agent's deed which is based on the actual authority of the foreign state constitutes activity of the foreign state. When an agent acts beyond the scope of his authority, however, that agent is not doing business which the sovereign has empowered him to do." *Phaneuf*, 106 F.3d at 307-08 (citing *Chuidian v Philippine National Bank, et al.*, 912 F.2d 1095, 1106 (9th Cir. 1990)). The issue before the Court is whether the NDSC officials and/or H.A. Chalid Mawardi had actual authority to issue the NDSC notes.[1]

Defendants' Arguments

Defendants argue that the commercial exception does not apply because *Defendants* did not issue the notes in question. The NDSC officials who signed the notes were not authorized to issue the notes and incur foreign debt on behalf of the government of the NDSC. Thus, because such unauthorized acts are not attributable to Indonesia or the NDSC, the acts are not a commercial activity of a foreign state and fall outside of the exception. To determine whether actual authority exists, the Court must look only to the statutes and regulations of the sovereign because only Indonesian law speaks to the issue of actual authority of the Indonesian government agencies and agents to issue promissory notes on behalf of Indonesia.

Plaintiff's Argument

Plaintiff argues that the Ninth Circuit stated that Phaneuf has offered evidence that the commercial exception applies so the burden is on Defendants to prove by a preponderance of the evidence that the exception does not apply. *Phaneuf* 106 F.3d at 306. The affidavits presented by Indonesia are not credible because Defendants' lawyers have been dishonest and the other affidavits are contradicted by Plaintiff's exhibits. For example, Plaintiff's Ex. #13 filed with his original Opposition to Motion to Dismiss, a newspaper article in the Far Eastern Economic Review stating that General Achmad signed the notes, contradicts General Achmad's affidavit stating that he never signed any document authorizing individuals to issue promissory notes on behalf of the NDSC or the Republic of Indonesia. Additionally, Defendants' allegations that there was widespread dissemination of the repudiation of the NDSC notes is contradicted by many important entities' lack of knowledge on this issue. Plaintiff further alleges that all the persons involved in the issuance of the NDSC notes were not agents but officers of a government agency. In this case, instead of Indonesia acting directly, it acted through its alter ego, the NDSC .

Actual Authority

A sovereign may not be held liable for the acts of its agents absent the existence of actual authority. *Phaneuf* 106 F.3d at 308. In reaching this decision the Ninth Circuit relied on a long line of cases involving the sovereign immunity of the United Sates and analogized this case to those where the authority of a United States' agent was at issue. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Federal Crop Inc. Corp. v. Merrill*, 332 U.S. 380, 384, (1947); *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir. 1981); *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981); *see also Trajano v. Marcos*, 978 F.2d 493, 498 (1992) (applying the foregoing concepts to foreign sovereigns); *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990) (same). Those who rely on representations of authority made by purported agents of the government bear the risk that the agent is acting outside the scope of his authority. *Phaneuf*, 106 F.3d at 308 (citing *Merrill*, 332 U.S. at 384).

The Ninth Circuit in *Chuidian*, extended this concept into international law by looking to a

Philippine Executive Order to find actual authority. *See* 912 F.2d at 1097. Additionally, the Ninth Circuit found that "[w]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Chuidian*, 912 F.2d at 1106 (citing *Larson*, 337 U.S. at 689). For example in *Trajano*, the Ninth Circuit found that when the daughter of Philippine President Marcos tortured to death a young man, her actions could nor have been taken, with any official mandate and, therefore, were not an act of an agent or instrumentality of the government. *Trajano*, 978 F.2d at 498. Thus, Marcos was not immune under FSIA because FSIA does not immunize act of individuals outside the scope of their official duties. *Id.* at 498. The Ninth Circuit extended this analogy to NDSC in this case stating that acts taken without an official mandate could not "have been acts of an agent or instrumentality of a foreign state within the meaning of FSIA." *Phaneuf* 106 F.3d at 308 (citing *Trajano*, 978 F.2d at 498). Furthermore, "[t]he language 'commercial activity of the foreign state' excludes an agent's unofficial acts, i.e., acts taken without actual authority." *Phaneuf* 106 F.3d at 308. Thus, if the Court Finds that Hartomo and Soedewo, the officials who signed the notes, as well as Mawardi, acted outside the scope of their authority, the commercial exception to FSIA's immunity is not triggered and there is no jurisdiction.

Indonesia follows the civil law tradition, thus, law exists only to the extent it is published in the form of statutes and decrees. (Komar Decl. ¶ 3 (filed 2/15/95 Doc # 25)). The principal regulations concerning foreign credits, loans that give rise to an obligation to repay funds abroad in foreign currency such as Plaintiff's notes, are Presidential Decree No. 59 of 1972 ("59/1972"), Presidential Decree No. 17 of 1978 ("17/1978"), and Presidential Decree No. 261 of 1973 ("261/1973"). (Komar Decl. ~¶¶ 4, 5, 6 (filed 2/15/95 Doc. #25)). The execution of notes or bonds is controlled by Decree 17/1978 authorizing only the Ministry of Finance to issue notes or bonds in the name of the Republic of Indonesia. (Defs'. 10/17/97 Mot. to Dismiss p.8, Doc. #61 citing to Komar Decl.¶ 4, (filed 2/14/95 Doc. #25)). These decrees illustrate that foreign credits can be obtained and received only by the designated representatives of the Indonesia government, the Ministry of Finance and the Bank of Indonesia. (Zarkaski Decl. ¶ 7 and Komar Decl. ¶ 5 (filed 2/15/95 Doc. # 25)). Additionally, the NDSC is statutorily defined as a non-departmental institution by Article 2(1) of Decree 59/1972. (Komar Decl. ¶ 9 Doc. #25). Under Decree 59/1972 Article 2(1) non—departmental governmental institutions may not seek or accept offers of foreign credit. (Komar Decl. ¶ 6, 9 Doc. #25).

Thus, the NDSC had no authority to issue promissory notes. *Id.* Furthermore, Ibnu Hartomo, whose signature appears on the notes admits he had no authority to issue the notes and knew this when he signed them. (Hartomo Decl. ¶ 1 (Ex. A. filed 10/17/1997)). Plaintiff alleges that General Achmad Wiranatakusumah, Secretary General of the NDSC during the relevant period, signed a letter of authorization for the issuance of the notes. Defendant contends that this letter is a forgery. Regardless, Plaintiff's argument is unavailing because General Achmad Wiranatakusumah had no authority to issue promissory notes or authorize others to issue promissory notes. (Achmad Aff. 3/23/98, Doc #85). Moreover, Ambassador Mawardi was a diplomatic representative and Presidential Decree No. 51/1976 strictly limits the scope of authority of ambassadors to matters within the diplomatic sphere. (Supp. Komar Decl. ¶ 4 (filed 5/15/95 Doc.#35). Reviewing the relevant regulatory framework, it is clear that neither the NDSC, any of its officers, or Mawardi had actual authority to issue the NDSC notes.

III. CONCLUSION

From the facts of this case the extent of the Indonesian government's involvement in the issuance of the NDSC notes is unclear. However, the court must take into consideration international systems including respect for the actions taken by foreign sovereigns, principles of comity between nations and the basic policies underlying FSIA. *See Chuidian*, 912 F.2d at 1104; *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983). Plaintiff has presented numerous exhibits but he has not effectively organized them or demonstrated their relationship to his arguments. Furthermore, he often fails to identity the precise location of the exhibit he is referring to, and due to the sheer number of exhibits filed over many years it is a waste of judicial resources to attempt to decipher which argument each exhibit would support and how that exhibit supports Plaintiff's arguments.

Moreover, his evidence is predominantly newspaper articles. Although Plaintiff could have pursued traditional methods of obtaining discovery (i.e., subpoenas or motions to compel) in light of Rule 44.1 and Rule 12(b)(1) of the Federal Rules of Civil Procedure, there is no record of Plaintiff seeking the Court's assistance in his discovery difficulties.

Nonetheless, reviewing the evidence presented by Plaintiff, it is apparent that the Defendants have proven by a preponderance of the evidence that the commercial exception does not apply in this action. Hartomo, Soedewo, and Mawardi were not authorized to issue the promissory notes. General Achmad Wiranatakusumah did not have the authority to authorize the issuance of the notes. Thus, such unauthorized acts are not attributable to Indonesia or to the NDSC. Therefore, the issuance of the NDSC notes was not a "commercial activity of the foreign state." Because the National Defense Security Council, the Republic of Indonesia, and II.A. Mawardi must be granted immunity pursuant to FSIA, this Court lacks jurisdiction to entertain a suit for breach of contract. 28 U.S.C. § 1604. Thus, the Court will grant the motion to dismiss for lack of subject matter jurisdiction.

Accordingly,

IT IS ORDERED that Defendants' October 17, 1997 Motion to Dismiss is GRANTED. IT IS FURTHER ORDERED that this case is DISMISSED with prejudice and all pending motions are denied as moot.

Dated this 30 day of March, 1999

s/William D. Browning
William D. Browning
Senior United States District Judge

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[1] This would appear to be a factual issue precluding dismissal at this early stage in the proceeding. However, on a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(l), the Court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings. *See Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 39 (9th Cir. 1978). Additionally, Fed. R. Civ. P. 44.1 gives courts the freedom to consider all relevant material when deciding issues of foreign law.

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FEB 4, 2000

CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
By: s/____________________Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CURTIS A. PHANEUF,) CV-94-746-TUC-WDB

Plaintiff,)

) ORDER

vs.)

THE REPUBLIC OF INDONESIA, a foreign state; the NATIONAL DEFENSE SECURITY COUNCIL OF THE REPUBLIC OF INDONESIA JAKARTA, an agency or instrumentality of a foreign state; H.A. CHALID MAWARDI, Ambassador of Indonesia,)

Defendants.)

Pending before the Court are Plaintiff's April 9, 1999, Motion for New Trial (Motion for Reconsideration) Pursuant to Rule 59 and Defendants' October 22, 1999, Motion to Strike Plaintiff's Supplemental Exhibits to the Memorandum on Remand Regarding Authority.

1. FACTUAL AND PROCEDURAL BACKGROUND

This action, based on breach of contract, was brought to collect on seven promissory notes allegedly issued on behalf of the Indonesian government in 1985. Each note had a face value of up to twenty-five million U.S. dollars ($25.000.000). The notes, along with 500 similar notes, were issued by several members of the National Defense Security Council ("NDSC") of the Republic of Indonesia. Specifically, they were signed by Dr. Ibnu Hartomo, Deputy of Development for the NDSC and Mr. S. Soebagyo Soedewo, Deputy of Long Term Planning for the NDSC, and "notarized" as official by H.A. Chalid Mawardi, then Indonesia's ambassador to Syria. The Republic of Indonesia alleges that the notes were not properly authorized and invalid under Indonesian law. The Bank of Indonesia has refused to honor the notes.

Plaintiff brought an action to enforce payment on the notes in his possession. On February 15, 1995, Defendants filed a motion to dismiss, arguing this Court lacked subject matter jurisdiction to hear the case under the Foreign Sovereign Immunities Act ("FSIA"). September 25, 1995, the Court denied the Defendants' motion to dismiss, finding that Defendants failed to establish a *prima facie* case that the FSIA applied, because they failed to establish that a public act had occurred, triggering FSIA immunity. Defendants appealed the decision, and the Ninth Circuit reversed, holding the Defendant had established a *prima facie* case of immunity under FSIA. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997). Additionally. the Ninth Circuit held an agent of a foreign state must have acted with actual authority for a plaintiff to invoke the commercial exception to FSIA immunity against a foreign state. *Id* . The case was remanded on two issues: (1) were Mawardi's actions within the scope of his authority entitling him to immunity under the FSIA, and (2) does the commercial activity exception apply to the Defendants. *Phaneuf*, 106 F.3d 302.

On remand, Defendants filed another motion to dismiss, which this Court granted on March 31, 1999. After reviewing evidence concerning the Indonesian governmental system and certain Presidential Decrees which mandate that foreign credit may only be obtained and received by the designated representatives of the Indonesian government, the Ministry of Finance and the Bank of Indonesia, the Court held the NDSC was not authorized to issue promissory notes. Thus, the actions of Mawardi and the NDSC were outside the scope of authority, were not attributable to the Indonesian government, and the commercial activity exception to the FSIA did not apply. The Court then dismissed this case for lack of subject matter jurisdiction.

On April 9, 1999, Plaintiff filed a Motion for New Trial and Reconsideration, and requested leave to file a delayed memorandum in support of his motion. Leave was granted and the Memorandum was filed on May 10, 1999. Plaintiff also filed a Notice of Filing Supplemental Exhibits, which Defendants moved to strike on October 22, 1999. It is the Motion for Reconsideration and Motion to Strike the Court considers today.

II. PROCEDURAL POSTURE

Plaintiff has alternatively described his April 9, 1999, Motion as a Motion for New Trial under Federal Rule of Civil Procedure 59 and a Motion for Reconsideration. In the April 9, 1999, Motion Plaintiff specifically requested a new trial under Rule 59(a). However, no trial on the merits has ever been held in this action, only a hearing on whether the Court had jurisdiction to hear the case. Accordingly, the Court must consider Plaintiff's Motion to be a motion to alter or amend a judgment under Rule 59(e) or a motion for reconsideration under Rule 60(b).

A district court has broad discretion in granting or denying a motion to alter or amend a judgment. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999). Generally, alterations need not be granted, "absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or there is an intervening change in the controlling law." *Id.* at 1255 (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). As the Plaintiff has claimed newly discovered evidence as the grounds for alteration or reconsideration, the Court will review the Motion in light of the standards required by Rule 60(b)(2).

III. THE MOTION TO STRIKE PLAINTIFF'S SUPPLEMENTAL EXHIBITS

Defendants have objected to the inclusion in the record of two Indonesian news articles and translations obtained by the Plaintiff Among other things, Defendants note that the articles have not been entered into evidence by sworn testimony nor been verified pursuant to 28 U.S.C § 1746, the evidence contains hearsay statements, and there is not authentication of the translations. "Consequently, the exhibits are inadmissible under the Federal Rules of Evidence." (Defendants' Motion to Strike Plaintiff's Supplemental Exhibits to the Memorandum on Remand Regarding Authority, at 2).

The Federal Rules of Evidence do not apply in this situation. Under Federal Rule of Civil Procedure 41.1, "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." F.R.C.P, 44.1; *See Universe Sales Company, Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (when considering foreign law courts may use any relevant material without regard to whether it is admissible under the Federal Rules of Evidence). Moreover, in 1972 the reference to the Rules of Evidence was included to "free the judge, in determining foreign law, from any restrictions imposed by evidence rules. . . . " F.R.C.P, 44.1, Advisory Committee Notes, 1972 Amendment. Consequently, the Court denies Defendant's Motion to Strike the additional Exhibits.

III. PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff has requested the Court reconsider its decision of March 31, 1999, pursuant to Rule 60(b)(2). In his motion, Plaintiff states "New evidence is now available that was not available before the November 19th hearing which destroys the Defendants' contention and the Court's reliance on the 'principle regulations' and once again seriously challenges the credibility of the Defendants, their witnesses and their attorneys." (Plaintiff's Motion for New Trial (Motion For Reconsideration) Pursuant to Rule 59 and Motion for Leave to File Delayed/Supplemental Memorandum in Support of the Motion, at 2).

To obtain relief under Rule 60(b)(2) on the basis of newly-discovered evidence, the Plaintiff must show the evidence (1) existed at the time the district court dismissed the case, (2) could not have been discovered at that time through due diligence, and (3) was "of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (per curiam) (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987)).

Plaintiff fails to meet this standard for reconsideration. The Court can decipher no newly discovered evidence within Plaintiff's pleadings and exhibits. Of the twenty-six exhibits attached to Plaintiff's motion, nineteen have already been entered into the record. The seven remaining "new" exhibits do not meet the standard: Exhibit 3 is an excerpt from the transcript of the November 19, 1998, hearing; Exhibits 9, 11 and 12 are lists of people and information already within the record; Exhibit 10 consists of letters from various banks which were in Plaintiff's possession before November 19, 1998. The arguably new evidence is Exhibit 4, a translation of a newspaper article, Exhibit 8, a letter from a librarian at the Library of Congress, and Exhibits 33 and 34, articles from Indonesian magazines. The letter from the librarian is clearly irrelevant, as it merely states that she was unable to locate certain materials in the Library of Congress' collection of Indonesian materials. As for the articles, although they were all published after the November 19, 1998, hearing, all but one was available before March 31, 1999. Thus, not only is it apparent that the bulk of this evidence is not new, neither was it unavailable. Due diligence, in the form of more extensive research, depositions, discovery requests and interrogatories, certainly should have provided the same information prior to November 19, 1998.

More importantly, however, neither the Motion for Reconsideration nor the Exhibits contain information that is of such "magnitude that production of it earlier would have been likely to change the disposition of the case." *Coastal Transfer*, 833 F.2d at

211. The articles submitted as Exhibits 33 and 34 discuss Ibnu Hartomo and Chalid Mawardi's involvement in the matter, restating the facts of the issuance of the notes that are not in dispute. Only Exhibit 4 addresses the issue of the validity of the Presidential Decrees, and tangentially the authority of the Defendants to issue the notes. The article notes that the Worker's Developmental Party Fraction had declared that 171 Presidential and Ministerial Decrees issued between 1988 and 1998 had been tainted with "corruption, collusion and nepotism." However, the Presidential Decrees at issue here were promulgated in the 1970s. While it may be notable that the Indonesian government engaged in corrupt activities in the 1980s, when the unauthorized notes were issued, this does not affect the Courts holding that under the Presidential Decrees the notes were unauthorized, the Defendants do not fall within the commercial exception to the FSIA, and the Defendants are therefore immune to suit.

IV. CONCLUSION

Notwithstanding the long history of this case, the Court has never progressed beyond the issue of whether it has jurisdiction to hear the claim. Under the FSIA, sovereign states are granted immunity from suit for their actions, except where the state has been involved in duly authorized commercial activities. Had the Republic of Indonesia authorized the NDSC to issue notes, this Court might have jurisdiction. However, as explained in the Order of March 31, 1999, Indonesian law did not authorize the issuance and this Court does not have jurisdiction. Nothing offered by the Plaintiff suggests otherwise.

Accordingly,

IT IS **ORDERED** that Defendants' October 22, 1999, Motion to Strike Plaintiff's Supplemental Exhibits to the Memorandum on Remand Regarding Authority is **DENIED**. IT IS FURTHER **ORDERED** that Plaintiff's April 9, 1999, Motion for New Trial (Motion for Reconsideration) Pursuant to Rule 59 is **DENIED**. Per the Court's Order of March 30, 1999, this case is **DISMISSED** WITH PREJUDICE.

Dated this 4th day of February, 2000

s/William D. Browning
William D. Browning
Senior United States District Judge

FILED
SEP 13 2001
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS A. PHANEUF, a single man,

Plaintiff-Appellant,

No. 00-15459

v.

D.C. No CV-
94-00746-WDB

GOVERNMENT OF INDONESIA,
a foreign state; THE REPUBLIC OF
MEMORANDUM
INDONESIA DEFENSE SECURITY
COUNCIL, an agency or
instrumentality of a foreign state;
H.A. MAWARDI, Ambassador,
Republic of Indonesia,

Defendants-Appellees.

Appeal from the United States District Court

for the District of Arizona
William D. Browning, District Judge, Presiding
Submitted August 17, 2001 **
San Francisco, California

Before: WOOD***, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

Curtis A. Phaneuf appeals the judgment of the district court granting the Rule 12(b)(l) motion to dismiss filed by the Government of Indonesia, the Republic of Indonesia Defense Security Council (the "NDSC"), and Ambassador HA. Mawardi (collectively, "Indonesia"). On remand from this court, see Phaneuf v. Republic of Indonesia, 106 F.3d 302 (9th Cir. 1997) ("Phaneuf I"), the district court held that the issuers of certain promissory notes (the "NDSC notes") did not have the actual authority to issue them, that the creation of the notes was not a "commercial activity of a foreign state," and that the court therefore lacked subject-matter jurisdiction under the Foreign Sovereign Immunity Act ("FSIA")'s commercial activity exception. See 28 U.S.C. § 1605(a)(2). The facts and prior proceedings are known to the parties; they are not recited herein, except as necessary.

I

In Phaneuf I, we instructed the district court as follows: "[A]n agent must have acted with actual authority in order to invoke the commercial activity exception against a foreign state. We express no opinion as to whether the issuers of the NDSC notes or Ambassador Mawardi acted with actual authority. We remand to the district court to determine whether the commercial activity exception applies to the defendants." 106 F.3d at 308 (footnote omitted). On remand, Indonesia introduced extensive evidence that the notes' issuers (the "Indonesian agents") did not possess the actual authority to issue the notes or to incur debt obligations on the Indonesian government's behalf. Most significantly, Indonesia provided declarations and testimony from experts on Indonesian law who stated that pursuant to Presidential Decree 59/1972, non-departmental governmental institutions, such as the NDSC, may not seek or accept offers of foreign credit. These experts all concluded that the NDSC did not possess the actual authority to issue these notes. Indonesia also submitted evidence that Mawardi, as an ambassador, lacked the authority to sign the notes. Indonesia also provided a declaration from Ibnu Hartomo, a former NDSC official and principal issuer of the notes, who stated that he knew he lacked actual authority when he signed them.

Phaneuf did not provide to the district court any credible evidence of the Indonesian agents' actual authority. He now argues on appeal that Presidential Decree 59/1972 was invalid because it was not published in the official State Gazette. Phaneuf's argument is based on a small portion of Indonesia's expert witness's testimony, in which he stated that Indonesian statutes must be published to be valid. In a supplemental declaration, the expert witness clarified his testimony to explain that implementing regulations, such as Presidential Decree 59/1972, do not have to be published in the Gazette. Therefore, the district court properly relied on Presidential Decree 59/1972 when it determined that the Indonesian agents lacked actual authority to issue the NDSC notes.

Phaneuf argues that the district court erroneously relied on copies of Indonesian decrees and testimony and declarations about Indonesian law, when it should have realized that Indonesia is a "strong-man" regime where the president could disregard the law and enact and repeal decrees at his pleasure. Phaneuf did not provide any credible evidence to support this claim, and the district court properly refrained from speculating along these lines. Cf. Zschering v. Miller, 389 U.S. 429 (1968).

Phaneuf also argues that we should reexamine our holding in Phaneuf I and consider theories of agency other than actual authority. This argument must fail, because Phaneuf has not met the standard to avoid the application of the law of the case doctrine: Our decision in Phaneuf I was not incorrect and its enforcement would not work a manifest injustice. See Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc).

II

The district court properly dismissed the claims against Mawardi. In Phaneuf I, we instructed the district court to determine if Mawardi acted within the scope of his authority: "If the district court finds that

Mawardi's actions were within the scope of his authority, then Mawardi is entitled to a presumption of immunity under the FSIA; if Mawardi acted without authority, the FSIA cannot shield him from suit in his individual capacity." 106 F.3d at 307 (footnote omitted). The district court correctly concluded that the Indonesian agents (including Mawardi) did not possess the actual authority to issue the NDSC notes. Therefore, Mawardi's actions were ultra vires, permitting Phaneuf to sue Mawardi in his individual capacity. See id. at 307. However, Phaneuf only sued Mawardi in his official capacity, and not as an individual. The district court properly dismissed the claims against Mawardi because it lacked jurisdiction over a suit against him in his official capacity. See Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.), 978 F.2d 493, 497 (9th Cir.1992).

III

The district court did not abuse its discretion when it denied Phaneuf's "Motion for New Trial (Motion for Reconsideration)," which the district court properly treated as a Rule 60(b)(2) motion to relieve Phaneuf from the court's judgment. To be entitled to relief under this rule "the movant must show [that the newly-discovered] evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was of such magnitude that production of it earlier would have been likely to change the disposition of the case." Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990) (internal quotation marks omitted). None of the documents submitted with Phaneuf's motion would have been likely to change the disposition of the case because none of them were relevant to the question of the Indonesian agents' actual authority.

AFFIRMED.[1]

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[1] Pending before this court is Phaneuf's October 2, 2000, "Notice of Filing of Supplemental Exhibits," which we construe as a motion to take judicial notice. The materials attached to this motion are irrelevant to the issue on appeal. Therefore, Phaneuf's motion is DENIED, and Indonesia's December 12, 2000 motion to strike these supplemental exhibits is DENIED AS MOOT.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation

FILED
OCT 25, 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS A. PHANEUF, a single man, No. 00-15459

Plaintiff-Appellant, D.C No. CV-94-00746-WDB

v.

GOVERNMENT OF INDONESIA, a foreign state; THE REPUBLIC OF INDONESIA DEFENSE SECURITY COUNCIL, an agency or instrumentality of a foreign state; H.A. MAWARDI, Ambassador, Republic of Indonesia,

Defendants-Appellees.

ORDER

Before: WOOD*, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

Judges Wood, Kozinski, and O'Scannlain have voted to deny the petition for rehearing.

Judges Kozinski and O' Scannlain have voted to deny the petition for rehearing en banc and Judge Wood so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

U.S. 9th Circuit Court of Appeals Reports

PHANEUF v. REPUBLIC OF INDONESIA, 106 F.3d
302 (9th Cir. 1997)
CURTIS A. PHANEUF, Plaintiff—Appellee, v.
REPUPLIC OF INDONESIA, a foreign state,
NATIONAL DEFENSE SECURITY COUNCIL OF THE
REPUBLIC OF INDONESIA - JAKARTA, an agency or
instrumentality of a foreign state; H.A. CHALID
MAWARDI, Ambassador Republic of Indonesia,
Defendants—Appellants.

No. 95—17131

UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Argued and Submitted November 4, 1996

Filed February 7, 1997

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Carolyn B. Lamm, White & Case, Washington, DC, for defendants-appellants.

William B. Blaser, Tucson, AZ, for plaintiff—appellee.
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Appeal from the United States District Court for the District of Arizona, William D. Browning, District Judge, Presiding San Francisco, California.

D.C. No. CV-94—00746—WDB

Before: Paul H. Roney, [fn*] Senior Circuit Judge, Robert R. Beezer and Stephen S. Trott, Circuit Judges.

[fn*] The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit sitting by designation.

[1] OPINION

BEEZER, Circuit Judge:

[2] The Republic of Indonesia, the National Defense Security Council of the Republic of Indonesia and H. A. Chalid Mawardi (collectively "defendants") appeal the district court's order denying the defendants' motion to dismiss on the basis of sovereign immunity and for lack of venue. We have jurisdiction over the district court's denial of the motion to dismiss pursuant to the collateral order doctrine. Schoenberg v. Exportadora del Sal, S.A. de C.V., 930 F.2d 777, 779 (9th Cir. 1991), cert. denied, 115 S. Ct. 581 (1994). Jurisdiction does not exist to review the district court's refusal to dismiss for lack of venue. American Concrete Agric. Pipe Ass'n v. No-Joint Concrete Pipe Co., 331 F.2d 706, 709 (9th Cir. 1964). We reverse and remand.

I.

[3] Plaintiff Curtis A. Phaneuf holds several promissory notes allegedly issued by the National Defense Security

Council of the Republic of Indonesia ("NDSC"). These notes are part of approximately 505 promissory notes created by several then-members of the NDSC and valued at over three billion U.S. dollars ("NDSC notes"). The notes bear the signature of two NDSC members and the NDSC crest. The principal maker of the notes, Ibnu Hartomo, traded the "NDSC notes" for promissory notes issued by Hassan Zubaidi, a Syrian based financier. In August 1985, defendant Mawardi, then Indonesia's ambassador to Syria, participated in a signing ceremony in Damascus. At the ceremony Mawardi purportedly confirmed that Hartomo represented the Indonesian government and that the "NDSC notes" were "Official/Governmental." Zubaidi's notes were later discovered to be worthless

[4] The Republic of Indonesia claims that it did not know about the "NDSC notes" until late in 1985, at which time it promptly determined that these notes were unauthorized and invalid under Indonesian law. In January 1986, the NDSC's Secretary General informed Bank Indonesia that neither the NDSC nor any of its officials had authority to issue promissory notes and that the "NDSC notes" were invalid. Bank Indonesia then sent communications to financial institutions advising that Indonesia had detected unauthorized promissory notes allegedly issued by the NDSC. In April 1987, the NDSC issued a press release which disavowed NDSC responsibility for the notes, stating that responsibility lay with the persons who signed the notes. Bank Indonesia has continuously refused to honor the notes.

[5] <Phaneuf> brought this action to enforce payment on the notes in his possession. The defendants moved to dismiss based on lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). The district court denied the defendants' motion to dismiss, stating that defendants had not established a prima facie case of immunity under FSIA.

[6] Defendants contend that the district court erred in denying motion to dismiss because: (1) they established a prima facie case of immunity under the FSIA; (2) the commercial activity exception to the FSIA does not apply to <Phaneuf>'s claim; and (3) venue is improper in the District of Arizona.

II.

[7] [1] The FSIA is the sole basis of subject matter jurisdiction over suits involving foreign states and their agencies and instrumentalities. Randolph v. Budget Rent-A-Car, 97 F.3d 319, 323 (9th Cir. 1996). Under the FSIA, foreign states are immune from suit unless one of the enumerated exceptions to the Act applies. 28 U.S.C. § 1330, 1604-05. The existence of subject matter jurisdiction Page 305 under the FSIA is a question of law reviewed de novo. Randolph, 97 F.3d at 323.

III.

[8] [2] The district court held that it currently had subject matter jurisdiction, but stated that it might revisit the issue later in the trial based on further

discovery. Subject matter jurisdiction under the FSIA, however, must be decided before the suit can proceed. Security Pac. Nat'l Bank v. Derderian, 872 F.2d 281, 283-84 (9th Cir. 1989). Immunity under the FSIA is not only immunity from liability, but immunity from suit. Compania Mexicana de Aviacion v. United States Dist. Court, 859 F 2d 1354, 1358 (9th Cir. 1988). The district court improvidently postponed its final determination of subject matter jurisdiction under the FSIA.

IV.

[9] The district court denied the defendants' motion to dismiss holding that defendants had not established a prima facie case of immunity. The district court relied on a footnote in Siderman de Blake v Respublic of Argentina in determining the prima facie requirements for sovereign immunity. See 965 F.2d 699, 708 n.9 (9th Cir.) (citing Meadows v. Dominican Republic, 817 F.2d 517, 522 (9th Cir.), cert. denied, 484 U.S. 976 (1987)), cert. Denied 507 U.S. 1017 (1993). Footnote nine of Siderman de Blake states:

> Where. . . the plaintiff alleges in his complaint that his claim is based on a foreign state's strictly commercial acts, the defendant must establish a prima facie case that it is a sovereign state and that the plaintiff's claim. arises out of a public act. This proof establishes a presumption that the foreign state protected by immunity.

[10] Id.

[11] In its order, the district court stated that defendants failed to show that the "acts complained of arise out of a public act." Defendants had argued to the district court that the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a) (2), did not apply because they had not participated in the issuance of the promissory notes. The district court concluded that the defendants could not "consistently argue that they are entitled to immunity (as a foreign sovereign for their sovereign acts) [under] the FSIA and, at the same time, argue that the acts alleged were not sovereign so as to defeat its exceptions."

[12] [3] We, however, have never required a defendant to establish that a plaintiff's claim arose from a public act. We did not engage in a public act inquiry in either Siderman de Blake or Meadows v. Dominican Republic, upon which Siderman de Blake relies, because neither case concerned whether the defendants had demonstrated a prima facie case of immunity. Siderman. de Blake, 965 F.2d at 707-08 (discussing whether plaintiffs met their burden of production that exceptions to the FSIA applied); Meadows, 817 F.2d at 523 (holding that the defendants had not met their final burden of persuasion that the commercial activity Exception did not apply). The suggestion in Siderman de Blake and Meadows that the FSIA prima facie case includes a public act requirement is dicta, and as such holds no precedential value.

[13] [4] In other existing precedent, defendants have established their prima facie entitlements to sovereign immunity by proving only that they qualified as "foreign state[s]" under 28 U.S.C. § 1603 (a)—(b). We did not require these defendants to demonstrate that the plaintiffs' claims arose from a public act. Export Group v. Reef Indus., 54 F.3d 1466, 1470 (9th Cir. 1995) (citing Meadows, 817 F.2d at 522-23); Gates v. Victor Fine Foods, 54 F.3d 1457, 1459-60 (9th Cir.), cert. denied, 116 S. Ct. 187 (1995); cf. Randolph, 97 F.3d at 324 (discussing the shifting of the burden of production under the FSIA without addressing a prima facie public act requirement and citing Siderman de Blake, 965 F.2d at 707-08).

[14] [5]. Further, the FSIA dictates that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607." 28 U.S.C. § 1604; see Compania Mexicana de Aviacion, 859 F.2d at 1359 ("We lack both statutory subject matter and personal jurisdiction over any claim against a

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foreign sovereign unless one of the Act's exceptions applies. . . ."). Sections 1605 through 1607 of Title 28 outline the only exceptions to the Act. Requiring a foreign state to prove a public act conflicts with the plain language of the statute: a foreign state is immune from suit unless one of the enumerated exceptions applies. There is no exception for non-public acts.

[15] [6] The legislative history of the FSIA also does not compel the conclusion that a defendant must prove a

public act to establish a prima facie case immunity. The suggestion in Meadows of a public act requirement was based, in part, on a House Reportort which states:

> [T]he burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state — that is, an act not within the exceptions in sections 1605—1607.

[16] H.R. Rep. No. 1487, 94th Cong., 2d sess. This legislative history, however, clarifies only that the defendant bears the burden of proof that no exception applies. It aces not necessitate a prima facie showing of a public act. The phrase "public act" is used to describe acts that do not fall within the enumerated exceptions to the FSIA.

[17] [7] Moreover, requiring a prima facie showing of a public act would prevent the defendants here from asserting a valid argument against the application of the commercial activity exception. The language of the commercial activity exception requires not only that there be "commercial activity", but also that there be commercial commercial activity of the foreign state." 28 U.S.C. § 1605 (a) (2). Defendants should be permitted to argue against the application of the exception on the grounds they did not act: that there

was no "commercial activity of the foreign state." Id. (emphasis added).

[18] [8] We conclude that the FSIA does not require the defendants to prove a public act to establish a prima facie case of immunity. Instead, they are entitled to a presumption of immunity if they are foreign states within the meaning of the Act. Gates, 54 F.3d at 1459-60; Export Group, 54 F.3d at 1470.

[19] [9] As conceded by <Phaneuf>, both Indonesia and the NDSC qualify as foreign states under the FSIA. [fnl] The district court erred in determininng that the Republic of Indonesia and the NDSC had not established a prima facie case of sovereign immunity.

[20] [10] We consider Mawardi's entitlement to a presumption of immunity separately. The district court held that Mawardi was not entitled to a presumption of immunity because he, along with the other defendants, had failed to establish a public act. As discussed above, the district court erred in requiring the defendants to prove a public act. Nonetheless, Mawardi may not be entitled to a presumption of immunity if he was acting outside the scope of his official authority. In Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.) we held that the FSIA applies to a foreign official acting in an official capacity, but does not apply to an official acting beyond the scope of the actor's authority. 978 F.2d 493, 497 (9th Cir. 1992) (citing Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103-06 (9th Cir. 1990) (holding that government officials fall within the definition of an "agency or instrumentality

of a foreign state")), cert. denied, 508 U.S. 972 (1993). In Trajano, we defined "beyond the scope of the official's authority" to include anything the sovereign has not empowered the official to do. Id. Because the district
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did not make any factual findings as to either Mawardi's actions or the scope of his authority, we remand this issue to the district court. If the district court finds that Mawardi's actions were within the scope of his authority, then Mawardi is entitled to a presumption of immunity under the FSIA; if Mawardi acted without authority, the FSIA cannot shield him from suit in his individual capacity. [fn2]

V.

[21] Because the defendants, with the exception of Mawardi, have established a prima facie case of immunity, the burden of production shifts to the plaintiff to offer evidence that an exception applies. See Randolph, 97 F.3d at 314. <Phaneuf> submitted affidavits and other evidence to support the theory that the NDSC members had either actual or apparent authority to issue the promissory notes. <Phaneuf> asserts that defendants actions fall within the third clause of the commercial activity exception. That provision states that a foreign sovereign is not immune from jurisdiction when the action is based:

> upon an act outside the territory of the United States in connection: with a commercial activity of the foreign state

elsewhere and that act causes a direct effect in the United States.

[22] 28 U.S.C. § 1605(a) (2) .

[23] [11] Because <Phaneuf> offered evidence that the commercial activity exception applies, the defendants bear the burden of proving by a preponderance of the evidence that the exception does not apply. See Randolph 97 F.3d at 324; Joseph v. Office of Consulate Gen. of Nig., 830 F.2d 1018 1021 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988) .

[24] [12] The issuance of sovereign debt is a commercial act which within the exception claimed by <Phaneuf>. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612—617 (1992). Defendants concede this issue.

[25] [13] Defendants maintain, however, that the commercial activity exception does not apply because they are not responsible for the issuance of the notes. They contend there was no "commercial activity of the foreign state." 23 U.S.C. § 1605 (a) (2) (emphasis added). Defendants argue they are not bound by the actions of the former NDSC members or Ambassador Mawardi because these government officers exceeded the scope of their authority in issuing and certifying the validity of the notes. The question is whether an agent of a foreign state must have acted with actual authority to invoke the commercial activity exception against a foreign state, or whether apparent authority suffices. [fn3]

[26] [14] In interpreting the FSIA, we first look to the plain meaning of the language employed by Congress. Straub v. A P Green, Inc., 38 F.3d 443, 411 (9th Cir. 1994). The language of the commercial activity exception compels the conclusion that only evidence of actual authority can be used to invoke that exception. All three clauses of the exception require "a commercial activity of the foreign state." 28 U.S.C. § 1605(a) (2) (emphasis added). "[C]ommercial activity of the foreign state" clearly entails commercial activity in which the foreign state engaged. Because a foreign state acts through its agents, an agent's deed which is based on the actual

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authority of the foreign state constitutes activity "of the foreign state."

[27] When an agent acts beyond the scope of his authority, however, that agent "is not doing business which the sovereign has empowered him to do." Chuidian, 912 F.2d at 1106 (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). If the foreign state has not attributed to the foreign state; there is no "activity of the foreign state."

[28] We assume that "the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." Export Group, 54 F.3d at 1473 (internal quotations omitted). We are not to imply exceptions. Id. If Congress had intended the commercial activity exception to apply to an agent's acts committed without actual authority it could have so indicated in the

language of the exception. Instead, the plain meaning of the language "commercial activity of the foreign state" illustrates that Congres intended the exception to apply only in cases of actual authority.

[29] Our holding in Chuidian and Trajano support this conclusion. Chuidian, 912 F.2d at 1103, 1106; Trajano, 978 F.2d at 497-98. In Chuidian we held that an agent is not entitled to immunity under the FSIA. 912 F.2d at 1106. A corollary to this principal must be that the foreign state retains its immunity when its agent acts outside the scope of his authority. "Where an officer's powers are limited . . . his actions beyond those limitations are considered individual and not sovereign actions.'" Id. (quoting Larson, 337 U.S. at 689) .

[30] [15] Further, in Trajano we held that the defendant was not entitled to immunity because the acts were taken without official mandate and thus could not "have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA." 978 F.2d at 498. Therefore, unofficial acts are also not acts of a "foreign state." 28 U.S.C. § 1603 (a) (defining "foreign state" to include an "agency or instrumentality of a foreign state"). The language "commercial activity of the foreign state" excludes an agent's unofficial acts, i.e., acts taken without actual authority.

[31] [16] Chuidian drew support for its conclusion by references to the sovereign immunity of the United States. Chuidian, 912 F.2d at 1101-02, 1106. Further comparison to United States immunity buttresses the reading of an actual authority requirement into the commercial activity exception of the FSIA. When

dealing with a purported agent of the United States, the third party bears the risk that the agent is acting outside the scope of the agent's authority, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 330, 384 (1947), even if the third party reasonably believes the agent has authority. Bollow v. Federal Reserve Bank 650 F.2d 1093, 1100 (9th Cir. 1981). Moreover, the government can be estopped from asserting immunity only when its agent has acted within the scope of authority. Saulque v. United States, 663 F.2d 968, 976 (9th Cir. 1981). These precedents support the conclusion that evidence of apparent authority should not be sufficient to invoke the FSIA's commercial activity exception.

[32] We hold that an agent must have acted with actual authority in order to invoke the commercial activity exception against a foreign state [fn4] We express no opinion as to whether the issuers of the "NDSC notes" or Ambassador Mawardi acted with actual authority. We remand to the district court to determine whether the commercial activity exception applies to the defendants.
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VI .

[33] Defendants also argue that venue is improper in the District of Arizona. <Phaneuf> claims venue under 28 U.S.C. § 1391(f) (l).[fn5] Although neither party disputes appellate jurisdiction over this issue, we consider our jurisdiction sua sponte. Benavidez v. Eu, 34 F.3d 825, 830 (1994).

[34] In American Concrete Agric. Pipe Ass'n v. No-Joint Concrete Pipe Co., we held that an order denying a motion to dismiss for want of venue is interlocutory and not appealable under 28 U.S.C. § 1291. 331 F.2d at 309. We do not have jurisdiction over the district court's order denying defendants' motion to dismiss for lack of venue.

[35] REVERSED AND REMANDED.

[fn1] A "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603 (a). An "agency or instrumentality" of a foreign state is defined as an entity:

> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof . . . and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1663 (b). The Republic of Indonesia is a foreign state and the NDSC meets the definition of an "agency or instrumentality" of a foreign state.

[fn2]<Phaneuf is suing Mawardi in his official capacity and not as an individual .

[fn3] We distinguish the issue here from the inquiry undertaken to determine whether an agency or

instrumentality of a foreign state is the "alter ego" of the foreign state. See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 627-633 (1983) (Bancec); Gates, 54 F.3d at 1460 n.1. Normally, we accord a presumption of independence to an agency or instrumentality of the foreign state; this presumption can be overcome, however, when the level of state control is such that the acts of the governmental agency are in effect the acts of the state. Banec, 462 U.S. at 629-34 (applying presumption in liability context); Gates, 54 F.3d at 1460 n. 1.

Our concern here, however, is not the level of control a foreign state must exercise over an agency before we will attribute the misdeeds of that agency to the foreign state. Rather, we focus on whether the action of an agent that exceeds the scope of his authority should be attributable to the foreign state.

[fn4] Our conclusion that the commercial activity exception may be invoked against a foreign state only when its agents have acted with actual authority contradicts a Second Circuit case, First Fidelity Bank, N.A. v. Government of Ant. & Barb. — Permanent Mission, 877 F.2d 189 (2nd Cir. 1989). In that case the court instructed the district court to hold on remand that jurisdiction existed over the foreign state if the district court found that the foreign state's ambassador acted with apparent authority. Id. at 194-96. The court, however, seems to have assumed the appropriateness of invoking the commercial activity exception based on apparent authority. The court gave no analysis or explanation of its statements regarding apparent authority.

[fn5] Section 1391 (f) (1) provides that venue is proper "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of that of the action is situated."

FILED
JUL 27, 2001
Cathy A. Catterson, Clerk
United States Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT,

CURTIS A. PHANEUF, a single man,	No. 00-15459
Plaintiff-Appellant,	D.C. No. CV-94-00746-WDB
v.	ORDER
GOVERNMENT OF INDONESIA, a foreign state; THE REPUBLIC OF INDONESIA DEFENSE SECURITY COUNCIL, an agency or instrumentality of a foreign state; H.A. MAWARDI, Ambassador, Republic of Indonesia,	
Defendants-Appellees.	

The Court is of the opinion that the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument.

Therefore. this matter is ordered submitted without oral argument on August 17, 2001, in San Francisco, California. Fed. R. App. P. 34(a)(2)(C).

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By s/____________________
Deputy Clerk

UNITED NATIONS - TREATY SERIES

No. 894 ROUND-TABLE CONFERENCE AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AND THE GOVERNMENT OF THE REPUBLIC OF INDONESIA:

COVERING RESOLUTION - WITH THE ATTACHED AGREEMENT ANDS AMD EXCHANGES OF LETTER ACCEPTED AT THE SECOND PLENARY MEETING OF THE ROUND-TABLE CONFERENCE AT THE HAGUE, ON 2 NOVEMBER 1949;

PROTOCOL SIGNED AT AMSTERDAM ON 27 DECEMBER 1949; AND

ACT OF TRANSFER OF SOVEREIGNTY AND RECOGNITION, SIGNED AT AMSTERDAM ON 27 DECEMBER 1949

Article 4

1. The Kingdom of the Netherlands and the Republic of the United States of Indonesia recognize and accept that all rights and obligations of Indonesia, under private and public law, are ipso jure transferred to the Republic of the United States of Indonesia, unless otherwise provided for in the special agreements included in the Union Statute.

Article 5

1. The Kingdom of the Netherlands and the Republic of the United States of Indonesia understand that, under observance of the provision of paragraph 2 hereunder, the rights and obligations of the Kingdom arising out of treaties and other international agreements concluded by the Kingdom shall be considered as the rights and obligations of the Republic of the United States of Indonesia only where and inasmuch as such treaties and agreements are applicable to the jurisdiction of the Republic of the United States of Indonesia ....

17

BILLS OF EXCHANGE, PROMISSORY NOTES AND CHECKS

Indonesia is bound by the Geneva Convention on the unification of the rules regarding bills of exchange, promissory notes and checks of 1930 and 1931, published in the State Gazette 1935 No. 480, with the law of April 25, 1935 validated for Indonesia as of October 14, 1935 with Royal Decree of September 14, 1935 (Dutch State Gazette No. 579) and not revoked after Independence was obtained. So, the Indonesian regulations closely follow the Dutch Regulations.

LEAGUE OF NATIONS - TREATY SERIES

3314. - CONVENTION FOR THE SETTLEMENT OF CERTAIN CONFLICTS OF LAWS IN CONNECTION WITH BILLS OF EXCHANGE AND PROMISSORY NOTES. SIGNED AT GENEVA, JUNE 7,1930.

Article 4

The effects of the obligations of the . . . maker of a promissory note are determined by the law of the place in which these instruments are payable.

The effects of the signatures of other parties liable on a . . . promissory note are determined by the law of the country in which is situated the place where the signatures were affixed.

ANNEX I.

UNIFORM LAW ON BILLS OF EXCHANGE AND PROMISSORY NOTES.

TITLE I.

BILLS OF EXCHANGE

CHAPTER I - ISSUE AND FORM OF A BILL OF EXCHANGE

Article 20

The provision of Articles 1 to 18 of the present Annex with regard to bills of exchange apply likewise to promissory notes.

Foreign Sovereign Immunities Act — promissory notes under commercial activity exception — need for actual authority of agent of foreign state under commercial activity exception — burdens of production and proof under the Act

PHANEUF V. REPUBLIC OF INDONESIA. 106 F.3d 302.
U S. Court of Appeals, 9th Cir., February 7, 1997.

Phaneuf sued the Republic of Indonesia, the National Defense Security Council of the Republic of Indonesia (NDSC), and the former ambassador of Indonesia to Syria, H A. Chalid Mawardi, in his official capacity on promissory notes bearing the signature of two NDSC members and the NDSC crest. The notes formed part of approximately 505 promissory notes created by NDSC members and valued at over three billion U.S. dollars. The notes were signed and issued in August 1985 in Damascus, Syria, in a ceremony at which Ambassador Mawardi represented that the notes were "Official/Governmental." In early 1986, the Government of Indonesia informed financial institutions that the notes were unauthorized and refused to honor them.

In an unpublished opinion, the U.S. district court in Arizona denied defendants' motion to dismiss the action under the Foreign Sovereign Immunities Act (FSIA). The U.S. Court of Appeals for the Ninth Circuit reversed.

Noting that the district court had decided that it currently had subject matter jurisdiction but might reconsider the issue later, the court of appeals stated that subject matter jurisdiction under the FSIA must first be decided before the action can proceed. The court then held that, although the defendants bear the burden of establishing their immunity, the district court had erred in requiring the defendants, in order to establish a prima facie case of immunity, to prove that the "acts complained of arose out of a public act" not within the commercial or other exceptions to immunity enumerated in the FSIA. "Instead," the appeals court stated, "they are entitled to a presumption of immunity if they are foreign states within the meaning of the Act."[1] This is especially true since the basic argument of Indonesia was that it had committed no act at all in connection with the suit.

Having conceded that the Republic of Indonesia and the NDSC are foreign states under the FSIA, the plaintiff had the burden of production to offer evidence that an exception to immunity applied. Noting that defendants conceded that the issuance of sovereign debt falls within the commercial activity exception,[2] the court decided that plaintiff had met this burden of production and that defendants accordingly bore the burden of proving that the exception did not apply. Mawardi, however, would be entitled to a presumption of immunity only if he were acting within the scope of his authority, a matter the district court would have to determine on remand.

Defendants contended that the commercial activity exception of the FSIA expressly applies only to commercial activity "of the foreign state," and that they were not bound by actions of government officers that exceeded the scope of their authority. The court defined the question as "whether an agent of a foreign state must have acted with *actual* authority to invoke the commercial activity exeception against a foreign state, or whether *apparent* authority suffices."[3]

The court reviewed the plain meaning of the words "of the foreign state" and its own prior decisions that an agent of a foreign state acting without authority is not entitled to immunity, as well as a decision by the Supreme Court on domestic immunity to the effect that, when dealing with a purported agent of the United States, the third party bears the risk that the agent is acting outside the scope of his or her authority.[4] It decided that an agent must have acted with actual authority so as to invoke the commercial activity exception against a foreign state under the FSIA, and remanded the case for a determination on the issue of actual authority. The court noted that this decision contradicts a Second Circuit case[5] that "seems to have assumed the appropriateness of invoking the commercial activity exception based on apparent authority" but with "no analysis or explanation."[6]

* * * *

This decision is troubling for a variety of reasons. It is alleged that the notes were issued in Syria by Indonesian officials. The only contact with the United States was the mention of U.S dollars. Yet the court's frame of reference for the discussion of the actual/apparent authority dichotomy was the law of the United States, with no mention of foreign law. Although this discussion occurred in the context of trying to determine the jurisdiction of the court under the FSIA rather than as a substantive analysis of agency law, it would seem that any holding on agency law as a predicate for jurisdiction should conform, in the end, to the determination of agency issues in the case on the merits.

The court's refusal to permit any kind of apparent authority argument is particularly troubling. The promissory notes in this case

> bear the signatures of two NDSC members and the NDSC crest. The principal maker of the notes, Ibnu Hartomo, traded the "NDSC notes" for promissory notes issued by Hassan Zubaidi, a Syrian based financier. In August 1985, defendant Mawardi, then Indonesia's ambassador to Syria, participated in a signing ceremony in Damascus. At the ceremony Mawardi purportedly confirmed that Hartomo represented the Indonesian government and that the "NDSC notes"

> were Official/Governmental." Zubaidi's notes were later discovered to be worthless.[7]

The notes bore official insignia and were signed by government officials whose authority was confirmed by the Indonesian ambassador to Syria in a public ceremony. What other authentication should a holder be required to have to determine the authority of the signing officials? The signing officials appear to have been fooled by the Syrian "financier." Although this failure of consideration would ordinarily not be effective against a holder in due course, from this case it would seem that a lack of authority would defeat a holder in due course. How likely is it that a U.S. court will reject a foreign government's analysis of its own constitutional and administrative law regarding delegations of authority? What, then, is the practical effect on the rule in the *Weltover* case[8] if a foreign government retains the option to obtain immunity from suit merely by establishing lack of "actual authority" of its agents, presumably under its own law, whenever a financial transaction proves to be sufficiently inconvenient to risk an adverse market reaction?

DANIEL E. MURRAY
University of Miami School of Law

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[1] 106 F3d 302, 306.

[2] 28 U.S.C. § 1605(a)(2) (1994).

[3] 106 F.3d at 307.

[4] Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

[5] First Fidelity Bank, NA v. Government of Antigua and Barbuda—Permanent Mission, 877 F.2d 189 (2d Cir. 1989), *summarized in* 84 AJIL 560 (1990).

[6] 106 F.3d at 308 n.4.

[7] Id. at 304.

[8] Republic of Argentina v. Weltover. Inc., 504 U.S. 607 (1992) *summarized in* 86 AJIL 820 (1992).

Supreme Court, U.S.
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No. 01-1164

IN THE

Supreme Court of the United States

CURTIS A. PHANEUF,
Petitioner,
v.
THE GOVERNMENT OF INDONESIA, A FOREIGN STATE; THE REPUBLIC OF INDONESIA DEFENSE SECURITY COUNCIL, AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE; H.A. MAWARDI, AMBASSADOR OF THE REPUBLIC OF INDONESIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

CAROLYN B. LAMM *
FRANCIS A. VASQUEZ, JR.
ANNE D. SMITH
FRANK PANOPOULOS
NICOLE ERB
WHITE & CASE LLP
601-Thirteenth Street, N.W.
Suite 600 South
Washington, D.C. 20005-3807
(202) 626-3600
Counsel for Respondents

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the unauthorized issuance of promissory notes by agents of the Republic of Indonesia that was in violation of Indonesian law and promptly and publicly disavowed by the Republic of Indonesia constitutes "commercial activity *of the foreign state*" within the meaning of the commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2).

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IN THE

Supreme Court of the United States

No. 01-1164

CURTIS A. PHANEUF,
Petitioner,
v.
THE GOVERNMENT OF INDONESIA, A FOREIGN STATE; THE REPUBLIC OF INDONESIA DEFENSE SECURITY COUNCIL, AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE; H.A. MAWARDI, AMBASSADOR OF THE REPUBLIC OF INDONESIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

OPINIONS BELOW

The first opinion of the court of appeals (App., *infra*, 1a-12a (*Phaneuf I*)) is reported at 106 F.3d 302 (9th Cir. 1997).[1] The second opinion of the court of appeals (Pet. App. A-31—A-36 (*Phaneuf II*)) is not reported. The order of the court of appeals denying the petitions for rehearing and rehearing

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[1] The first opinion of the court of appeals as it appears in the Appendix to the Petition (Pet. App. A-39—A-55) contains textual omissions and, therefore, is reproduced in the Appendix to this brief in opposition. App., *infra*, 1a-12a.

en banc (Pet. App. A-37—A-38) is not reported. The orders of the district court (Pet. App. A-1—A-6; App., *infra*, 13a-31a) are not reported.[2]

JURISDICTION

The court of appeals entered its final judgment on September 13, 2001. App., *infra*, 32a. The court of appeals denied the petitions for rehearing and rehearing *en banc* on October 25, 2001. Pet. App. A-37—A-38. Petitioner filed the petition for a writ of certiorari on January 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner's attempt to invoke the original jurisdiction of this Court under 28 U.S.C. § 1251(b)(1) is in error.[3]

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332 (a), 1391(f), 1441(d), and 1602-11), are reproduced at App., *infra*, 33a-34a.

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[2] The orders of the district court, dated March 31, 1999 and February 4, 2000, as they appear in the Appendix to the Petition (Pet. App. A-7—A-30) also contain textual omissions and, therefore, are reproduced, respectively, at App., *infra*, 13a-24a ("Mar. 31, 1999 Order") and 25a-31a ("Feb. 4, 2000 Order").

[3] The language of § 1254(1) does not support original jurisdiction over this case. Article III, Section 2, Clause 2 of the Constitution of the United States, as codified in 28 U.S.C. § 1251(b)(1), applies to "diplomatic and consular representatives *accredited to the United States* by foreign powers, not to those representing this country abroad." *Ex Parte Gruber*, 269 U.S. 302 (1925) (emphasis added). Respondent H.A. Chalid Mawardi was, at all times relevant to this action, the Indonesian Ambassador to Syria, not to the United States. *See* App., *infra*, 2a (*Phaneuf I*). Moreover, Petitioner has supplied no basis for his novel attempt to invoke the original jurisdiction of this Court after the lower courts already have disposed of the case. Pet. 21-22. Petitioner also has failed to comply with the requirements of Supreme Court Rule 17 governing the procedure in an original action.

STATEMENT OF THE CASE

A. *Phaneuf I*

In 1994, Petitioner Curtis A. Phaneuf brought an action under the FSIA in the United States District Court for the District of Arizona against Respondents the Government of Indonesia, the National Defense Security Council of the Republic of Indonesia ("NDSC"), and H.A. Chalid Mawardi ("Mawardi"), in his official capacity as then-Indonesian Ambassador to the Syrian Arab Republic, seeking payment from Respondents upon seven promissory notes allegedly issued by the NDSC in Indonesia in 1985.[4] App., *infra*, 2a-3a (*Phaneuf I*); *see also* App., *infra*, 13a-14a (Mar. 31, 1999 Order).

The "notes" bear the signatures of Ibnu Hartomo, the NDSC Deputy for Development, the brother-in-law of Indonesia's then-President Suharto and allegedly of Soebagyo Soedewo, the NDSC Deputy for Long-Term Planning. App., *infra*, 2a (*Phaneuf I*); *see also* App., *infra*, 14a (Mar. 31, 1999 Order). In late 1985, in Damascus, Syria, Mawardi allegedly confirmed that Hartomo's notes were "Official/ Governmental." App., *infra*, 2a (*Phaneuf I*). Hartomo traded the notes in Damascus, Syria, for other notes issued by Hassan Zubaidi, a Syrian-based "financier," whose notes later proved to be worthless. *Id.* After learning of the existence of the purported NDSC notes in late 1985, the Republic of Indonesia determined the notes were invalid and unauthorized under Indonesian law, and, in January 1986, so informed Bank Indonesia, the Republic of Indonesia's central bank. *Id.* Bank Indonesia then sent notices to financial institutions worldwide and thereafter continuously refused to honor the notes, and the NDSC issued a press release disavowing responsibility for them. *Id.* United States authorities have prosecuted individuals who have attempted to trade the notes. Pet. App. A-3.[5]

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[4] The original jurisdiction of the district court was invoked under 28 U.S.C. § 1330(a).

Respondents moved to dismiss the action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction under the FSIA,[6] on the ground that, because issuance of the notes was unauthorized and prohibited under Indonesian law, the issuance of the notes did not constitute an act "of the foreign state" within the meaning of 28 U.S.C. § 1605(a)(2), the FSIA's commercial activity exception to sovereign immunity. App., *infra*, 3a, 9a (*Phaneuf I*). The district court denied the motion, holding that Respondents had not established a prima facie case of sovereign immunity because Respondents had failed to prove the acts complained of arose out of "a public act." *Id.* at 4a; App., *infra*, 15a (Mar. 31, 1999 Order).

The court of appeals reversed, concluding that the FSIA does not require defendants to prove a public act to establish a prima facie case of sovereign immunity, App., *infra*, 6a, 12a (*Phaneuf I*), and determined that Respondents had established a prima facie case of immunity. *Id.* at 7a. The court further concluded that an act "of the foreign state" within the meaning of the FSIA's commercial activity exception requires a showing that the foreign state has empowered its agent to act: "If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state.'" *Id.* at 10a. Thus, the court reasoned that the language of the statute "excludes an agent's unofficial acts, i.e., acts taken without actual authority." *Id.* at 11a. Accordingly, the court held that "an agent must have acted with actual authority in order to invoke the commercial activity exception against a foreign state." *Id.* at 11a-12a.

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[5] Respondents contested below Petitioner's extensive and entirely unsupported assertions (Pet. 6-7) regarding the origin and subsequent history of the notes at issue, and, conspicuously, the district court and the court of appeals rejected these assertions.

[6] Petitioner mistakenly asserts that Respondents' motion was made under Rule 12(b)(6). Pet. 8.

The court of appeals noted that its decision was the corollary of one of its prior holdings, namely, that an agent of a foreign state acting outside the scope of his authority is not entitled to immunity, and consistent with another, namely, that acts of an agent taken without official mandate could not have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA. *Id.* at 10a-11a (citing cases). The court noted further that its conclusion was consistent with precedent holding that third parties dealing with agents of the United States bear the risk that the agents are acting outside the scope of their actual authority. *Id.* at 11a (citing cases).

The court of appeals then remanded to the district court for a determination "whether the commercial activity exception applies" to Respondents under these legal principles. *Id.* at 12a.

B. Proceedings On Remand

After conducting an evidentiary hearing and reviewing the evidence the parties introduced on remand,[7] the district court determined that the principal Indonesian laws governing the issuance of foreign credits and loans on behalf of the Republic authorize "only the Ministry of Finance to issue notes or bonds in the name of the Republic of Indonesia," and that "foreign credits can be obtained and received only by the designated representatives of the Indonesia[n] government, the Ministry of Finance and the Bank of Indonesia." App., *infra*, 21a, 22a (Mar. 31, 1999 Order). The district court also determined that Indonesian law specifically precluded the NDSC from seeking or accepting offers of foreign credit. *Id.* at 22a. It then concluded that because the notes were not authorized under Indonesian law and were issued and signed by persons without actual authority, there was no commercial activity "of the foreign state" and the FSIA's commercial activity exception did not apply. *Id.* at 23a.

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[7] Petitioner claims that the evidentiary hearing "was the only 'discovery' in this pretrial phase of the case." Pet. 9-10. As the district court noted, however, Petitioner never served a discovery request on Respondents or otherwise pursued any discovery. *See* App., *infra*, 23a (Mar. 31, 1999 Order) ("Although Plaintiff could have pursued traditional methods of obtaining discovery . . . there is no record of Plaintiff seeking the Court's assistance in his discovery difficulties.").

Petitioner filed a motion for a "new trial" seeking reconsideration based upon alleged "new evidence," which the district court denied on the grounds that the evidence was not newly discovered, was available prior to the evidentiary hearing by the exercise of due diligence, and was neither material nor relevant. App., *infra*, 29a-30a (Feb. 4, 2000 Order).[8]

C. *Phaneuf II*

On appeal from the decision on remand, the court of appeals affirmed the district court in all respects. Pet. App. A-31, A-36 (*Phaneuf II*). The court of appeals first reviewed the "extensive evidence" Respondents produced on remand that the issuers did not possess actual authority to issue the "notes" or incur debt obligations on behalf of the Indonesian Government. *Id.* at A-33. This evidence included, "[m]ost significantly," testimony "from experts on Indonesian law who stated that pursuant to Presidential Decree 59/1972, non-departmental institutions, such as the NDSC, may not seek or accept offers of foreign credit." *Id.* The experts concluded that the NDSC did not have actual authority to issue the notes. *Id.* In addition, there was evidence establishing that

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[8] The record directly contradicts Petitioner's claim (Pet. 11) that the evidentiary hearing was a trial on the merits. *See* App., *infra*, 27a (Feb. 4, 2000 Order) ("[N]o trial on the merits has ever been held in this action . . . ."). Similarly, the record lends no support (and Petitioner offered none) for the factual and legal assertions (Pet. 11) that follow Petitioner's claim of a "trial" on the merits.

Mawardi lacked actual authority to sign the notes and a declaration by Hartomo stating that he knew he lacked actual authority when he signed the notes. *Id.*

In contrast, Petitioner "did not provide to the district court any credible evidence" that the Indonesian agents possessed actual authority.[9] *Id.* As to Petitioner's argument on appeal that Presidential Decree No. 59/1972 was invalid, the court of appeals concluded the argument was "based on a small portion of Indonesia's expert witness's testimony" that the expert clarified in a supplemental declaration and, therefore, the district court properly relied upon the decree when it determined there was not actual authority to issue the notes. *Id.* at A-33—A-34.[10] As to Petitioner's claim that the President of Indonesia was a "strong man" who could disregard the law and enact and repeal decrees at his pleasure, the court of appeals concluded that Petitioner "did not provide any credible evidence to support this claim, and the district court properly refrained from speculating along these lines." *Id.* at A-34 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).[11]

The court of appeals further affirmed the district court's holding that Mawardi also did not possess actual authority to issue or ratify the notes; held that the district court did not abuse its discretion in denying Phaneuf's motion for reconsideration; and declined to reexamine its holding in

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[9] Petitioner's evidence before the district court was "predominantly newspaper articles." App., *infra*, 23a (Mar. 31, 1999 Order).

[10] Thus, Petitioner's claim (Pet. 10 n.1) that "nowhere on the record is there a statement where Dr. G. was accepted as an expert by the Court," is clearly mistaken. The court of appeals rejected Petitioner's further assertion (*id.*) regarding the alleged significance of Dr. Gautama's use of the term "law." Pet. App. A-33—A-34 (*Phaneuf II*).

[11] Petitioner's claim that there was no consideration of these claims below (Pet. 11-12) therefore is mistaken.

Phaneuf I because that holding was not incorrect and its enforcement would not work a manifest injustice. *Id.* at A-34—A-36.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT ISSUES REQUIRING REVIEW

A. The Decision Below Does Not Call For Exercise Of This Court's Supervisory Power

Petitioner does not support his claim that the decision of the court of appeals requires exercise of this Court's supervisory powers because the court of appeals applied "only a small part of the law of agency in an FSIA case." Pet. 16-17. Petitioner relies only upon his disagreement with the outcome of the case on remand and upon unsupported legal assertions that are contradicted by prevailing law. Review of the reasoning of the court of appeals and the facts in the record of this case demonstrates that the decision of the court of appeals was proper and in no way constitutes a "departure from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a).

The court of appeals reasoned that "[i]f the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state.'" App., *infra*, 10a (*Phaneuf I*). The court concluded that the statutory language of 28 U.S.C. § 1605(a)(2), which in all three clauses refers to a commercial activity by or "of the foreign state," "excludes an agent's unofficial acts, i.e., acts taken without actual authority." *Id.* at 10a, 11a. The court, therefore, held that an agent must have acted with actual authority before the agent's commercial activity will be attributed to the foreign state. *Id.* at 11a-12a.

The holding of the court of appeals is consistent with its previous rulings that look to the specific sovereign authorization for an agent's acts as part of a jurisdictional inquiry under the FSIA.[12] The decision also is consistent with long-standing U.S. case law regarding suits against the domestic sovereign. As the court of appeals expressly noted in support of its ruling (App., *infra*, at 11a (*Phaneuf I*)), the United States Government can be bound only by the acts of its agents who possess actual authority. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419-20 (1990) ("[T]he Government could not be bound by the mistaken representations of an agent unless it were clear that the representations were within the scope of the agent's authority.") (citing *Lee v. Monroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813)); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917) ("Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."); *The Floyd Acceptances*, 74 U.S. 666 (1868) (promissory notes not authorized by statute are not binding on the Government); *see also Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."). All governments, whether foreign or domestic, can only operate on similar principles of specifically delegated authority.

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[12] *See Trajano v. Marcos*, 978 F.2d 493, 497-98 (9th Cir. 1992) (alleged agent's acts were not taken within official mandate and therefore could not be deemed to be acts of a foreign state within the meaning of the FSIA); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106-07 (9th Cir. 1990) (agent's actions were authorized by Philippine Executive Order, were within his official capacity, and agent therefore was immune).

The record evidence and facts that the district court found in this case present an even more patent lack of authority than the above-described U.S. actual authority cases because Indonesian law specifically precluded the NDSC from issuing notes and permitted only the Ministry of Finance or, under certain circumstances, Bank Indonesia to do so. Pet. App. A-33 (*Phaneuf II*). Moreover, Petitioner failed to present evidence on remand that persuaded either the district court or the court of appeals that the Indonesian Government had authorized the issuance of the notes, whereas Respondents introduced ample evidence in support of the conclusion that the notes were unauthorized as a matter of Indonesian law. *Id.* ("Indonesia introduced extensive evidence" of lack of actual authority; "Phaneuf did not provide to the district court any credible evidence" of actual authority); App., *infra*, 23a (Mar. 31, 1999 Order) ("[R]eviewing the evidence presented by Plaintiff, it is apparent that the Defendants have proven by a preponderance of the evidence that the commercial exception does not apply in this action."). Given these circumstances, the court of appeals was entirely correct to apply the law of the case to Petitioner's request to revisit its earlier holding regarding the need for actual authority: "Our decision in *Phaneuf I* was not incorrect and its enforcement would not work a manifest injustice." Pet. A-34 (*Phaneuf II*) (citation omitted).

Fundamentally, Petitioner's claim of error is nothing more than a disagreement with the decision reached by the two courts below that thoroughly considered his claim and the evidence presented. Petitioner's argument is unsupported by reference to any relevant law and replete with misrepresentations of fact and law.[13] The other aspects of the "Law of Agency" (Pet. 9) that Petitioner contends should have been addressed below, namely "alter ego[] and ratification" (*id.*), are wholly distinct legal doctrines that, although briefed and addressed in the Indonesian law expert opinions, were not relevant to the district court or to the court of appeals. *See* Parts B and C, *infra*. There was no error in the decision below, much less any error that would require the Court "to intervene to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 648 n.7 (1987); *see also United States v. Payner*, 447 U.S. 727, 736 n.8 (1980) (same).

B. The Judgment Below Does Not Conflict With This Court's Decision In *Bancec*

Petitioner's alleged conflict between the decision of the court of appeals and this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983), is based entirely upon his mischaracterization of the *Bancec* case as being about the Cuban Government's alleged "ratification" of acts of certain government entities[14] and his misconstruction of the very different facts in this case. Pet. 13-14. The court of appeals properly distinguished *Bancec* due to the entirely distinct legal analyses and facts involved in that case. App., *infra*, 9a n.3 (*Phaneuf I*).

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[13] For example, Petitioner claims, without support from any record citations, that "[f]oreign governments would be allowed to manipulate the court system just by stating there was no authority *notwithstanding the proof to the contrary (such as Phaneuf provided herein).*" (Pet. 18) (emphasis added). As discussed above, the courts below found Petitioner's "proof" wanting and that Indonesian law did not authorize the issuance of the notes. Pet. App. A-33 (*Phaneuf II*); App., *infra*, 21a-22a, 23a (Mar. 31, 1999 Order).

[14] Petitioner does not provide any support for his characterization of the *Bancec* decision. The *Bancec* decision does not address any acts of "ratification" by the Cuban Government, and Petitioner does not point to any.

In *Bancec*, a Cuban trading bank (Bancec) brought suit against Citibank to collect on a letter of credit issued in Bancec's favor in 1960 in connection with a sale of Cuban sugar. 462 U.S. at 613-14. After the sale, and before Bancec commenced its action in the United States, the Cuban Government nationalized U.S. properties in Cuba, including property of Citibank, through forced expropriation. *Id.* at 614. Shortly after Bancec filed suit in 1961, it was dissolved and its capital split between Banco Nacional, Cuba's central bank, and effectively, the Ministry of Foreign Trade, which "would be the only beneficiaries of any recovery" on the letter of credit. *Id.* at 631-32.[15]

In its answer to Bancec's suit, Citibank asserted a setoff claim for the value of its properties that the Cuban Government had seized against Bancec's claim on the letter of credit. *Id.* at 615. Bancec did not contest jurisdiction under the FSIA, but argued that the FSIA applied to the substantive question of Bancec's liability for the nationalizations by the Cuban Government. *Id.* at 619-20. This Court disagreed, and held that where jurisdiction exists under the FSIA (i.e., where there is no immunity), "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *Id.* at 620.[16] It therefore determined that the FSIA did not control the substantive question of whether setoff should be allowed. *Id.* at 620-21.

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[15] A striking factual distinction between the *Bancec* and *Phaneuf* decisions lies in a comparison of the timing of the relevant foreign laws and/or government action. In *Phaneuf*, the governing Indonesian laws restricting the authority of the government agents, e.g., Presidential Decree No. 59 of 1972, were in place long *before* the issuance of the purported promissory notes, and parties are presumed to have knowledge of such applicable laws. In *Bancec*, the Cuban Government nationalized U.S. properties only *after* the letter of credit was issued and the obligation to pay arose, and then, shortly after Bancec filed suit, dissolved Bancec and divided its assets between governmental entities that would stand to benefit from any recovery on the letter of credit. 462 U.S. at 631-32.

Instead, the Court applied equitable principles "common to both international law and federal common law" to determine that Citibank could obtain a setoff for the value of its property that the Cuban Government had seized. *Id.* at 623. In doing so, *Bancec* addressed, for purposes of determining *liability*, the circumstances under which the normally separate juridical status of a government instrumentality may be disregarded. Bancec suggested that the presumption could be overcome "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or where "'the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.'" *Id.* at 629 (quoting *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 322 (1939)). This doctrine is akin to the concept of "piercing the corporate veil."

In contrast, in order to determine *jurisdiction* under the FSIA, the court of appeals in *Phaneuf I* addressed whether "a commercial activity *of the foreign state*" includes acts of agents of the Indonesian Government who acted outside the scope of their authority and in violation of Indonesian law. App., *infra*, 9a. The court did not need to determine whether a principal and agent relationship existed—one did exist; the agent, however, acted beyond the scope of his delegated authority and contrary to law. This inquiry is altogether different from the issues of control or disregard of separate corporate form contained in *Bancec*. As the court of appeals recognized:

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[16] Indeed, after jurisdiction under the FSIA is established, liability is to be determined according to the law as provided in 28 U.S.C. § 1606.

> We distinguish the issue here from the inquiry undertaken to determine whether an agency or instrumentality of a foreign state is the "alter ego" of the foreign state. . . . Normally, we accord a presumption of independence to an agency or instrumentality of the foreign state; this presumption can be overcome, however, when the level of state control is such that the acts of the governmental agency are in effect the acts of the state. . . .
>
> Our concern here, however, is not the level of control a foreign state must exercise over an agency before we will attribute the misdeeds of that agency to the foreign state. Rather, we focus on whether the action of an agent that exceeds the scope of his authority should be attributable to the foreign state.

App., *infra*, 9a n.3 (citing *Bancec*, 462 U.S. at 627-34; *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 n.1 (9th Cir. 1995)).

Bancec's analysis manifestly was not applicable to the question before the court of appeals in *Phaneuf*. Thus, there is no conflict between the two decisions.

C. There Is No Conflict Among The Circuits Requiring This Court's Attention

Petitioner incorrectly claims that the court of appeals decided "an important question in conflict with other circuits." Pet. 15. Neither of the cases Petitioner cites—*McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995) and *First Fidelity Bank, N.A., v. Government of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989)—support this claim.

In support of his argument that the court of appeals should have used "all of the law of agency," Petitioner contends that "'alter ego' seems to have been applied to the agency concept of an FSIA case" in the District of Columbia Circuit's decision in *McKesson*. Pet. 16. In *Foremost-McKesson, Inc. v. Islamic Republic of Iran*—a prior decision in McKesson Corporation's action against Iran—the District of Columbia Circuit defined the issue as "whether the government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship and thus permit th[e] court to deem Iran responsible for their actions" and remanded the case for consideration of that issue. 905 F.2d 438, 445 (1990). On appeal of the remand decision, the District of Columbia Circuit did not have to address whether the state entities—Pak Dairy and its state-owned shareholders—acted outside the scope of their authority. *See McKesson*, 52 F.3d at 351-52. Rather, the court affirmed the district court's attribution of Pak Dairy's acts to the Government of Iran based upon findings that Iran had exercised such extensive direction and control over Pak Dairy that, effectively, Iran was acting through the corporate instrumentality, thereby justifying jurisdiction over the foreign sovereign. *Id.* at 352. The analysis in *McKesson* thus was applied to *establish* an agency relationship. That inquiry, however, is not relevant to this case.

In *Phaneuf*, the court of appeals confronted an entirely different question, namely, "whether the action of an agent that exceeds the scope of his authority should be attributable to the foreign state." App., *infra*, 9a n.3 (*Phaneuf I*). There was no dispute that Hartomo, as Deputy of Development for the NDSC, and Mawardi, as then-Indonesian Ambassador to Syria, were agents of the Government. *Id.* at 2a; App., *infra*, 14a. The court of appeals, therefore, did not need to consider whether the Indonesian Government exercised extensive direction or control over Hartomo or Mawardi.[17] Instead, it considered whether Hartomo's and Mawardi's acts that exceeded the scope of their authority could be attributed to the Government of Indonesia. Pet. A-33 (*Phaneuf II*). Thus, the court recognized that it was not required to apply an "alter ego" theory to establish a relationship of principal and agent. App., *infra*, 9a n.3.

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[17] Hartomo even acknowledged that he acted without actual authority when he issued the notes. Pet. A-33 (*Phaneuf II*).

Moreover, with respect to "apparent authority," Petitioner apparently overlooked a more recent case in the District of Columbia Circuit that expressed doubt that jurisdiction under the FSIA could be based on apparent authority. *See Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 850 (D.C. Cir. 2000) ("We doubt . . . that a case of merely apparent authority falls within the agency exception—an exception limited by its terms to situations in which the instrumentality 'is so extensively controlled by [the sovereign] that a relationship of principal and agent is created.'") (quoting *Bancec*, 462 U.S. at 629). This decision of the District of Columbia Circuit is entirely consistent with the court of appeals' conclusion in *Phaneuf I* that "evidence of apparent authority should not be sufficient to invoke the FSIA's commercial activity exception." App., *infra*, 11a.

The Second Circuit's decision in *First Fidelity*, which according to Petitioner "considered apparent authority[] as a ground on which to find jurisdiction and apply FSIA to the facts of that case" (Pet. 15), did not squarely confront the question whether an agent must have acted with actual authority in order to invoke the commercial activity exception against the foreign state. Instead, as the Ninth Circuit noted, the Second Circuit merely "assumed the appropriateness of invoking the commercial activity exception based on apparent authority" without "analysis or explanation of its statements regarding apparent authority," App., *infra*, 12a n.4, and remanded the case to the district court. *First Fidelity*, 877 F.2d at 196; *see also Reiss v. Société Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 748 (2d Cir. 2000) (assuming without analysis that the question of apparent authority is relevant to an FSIA jurisdictional determination and remanding to the district court).

The Second Circuit has never expressly found that, under the FSIA's commercial activity exception, jurisdiction over a foreign state can be based only on apparent authority. As to the facts presented in this case, moreover, the Second Circuit reached the same result as the Ninth Circuit, namely, that there is no basis for jurisdiction under the FSIA. *See Storr v. Nat'l Defence Security Council of the Republic of Indonesia*, No. 95 Civ. 9663, 1997 WL 633405, *4 (S.D.N.Y. Oct. 14, 1997) (dismissing action against Respondents based on the same series of unauthorized promissory notes and virtually identical facts as in *Phaneuf* for lack of jurisdiction under the FSIA's commercial activity exception, and finding that "the signatories of the promissory notes possessed neither actual nor apparent authority to issue them"), *aff'd*, 164 F.3d 619 (1998) (Table), 1998 WL 673190 (2d Cir. Sept. 22, 1998) (unpublished summary order).[18] Thus, given that the Second Circuit affirmed the district court's dismissal in *Storr* on the same, unique facts as presented in this case, there is no conflict that requires this Court's attention.

II. NONE OF PETITIONER'S OTHER REASONS JUSTIFY THIS COURT'S REVIEW

A. This Court Should Not Hear Petitioner's Equal Protection Argument Because Petitioner Did Not Raise It Below

This Court repeatedly has held that it will not consider issues that were not presented to the court of appeals absent exceptional circumstances. *See, e.g., Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2

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[18] The decision of the district court and the summary order of the court of appeals in *Storr* are reproduced in the Appendix to this brief in opposition. App., *infra*, 35a-44a.

(1970)); *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646-47 (1992) (absent "unusual circumstances" Court will not hear issues presented for the first time in brief which were not raised in the lower courts); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981) (question presented in petition but "not raised in Court of Appeals is not properly before us."); *Duignan v. United States,* 274 U.S. 195, 200 (1927) (same).

On this basis alone, this Court should not entertain Petitioner's equal protection claim. Pet. 21. Prior to the Petition for Certiorari, Petitioner never raised this challenge at any stage of the proceedings. Additionally, however, Petitioner's unsupported argument easily can be dismissed on its merits, because in essence it asserts only that the existence of an alleged conflict in decisions between the circuits in and of itself violates the United States Constitution. Petitioner has cited no authority whatsoever for this novel interpretation of the doctrine of equal protection, which should be rejected in its entirety.

B. The Decision Below Does Not "Ignore[] And/Or Destroy[]" International Law Regarding Promissory Notes

Petitioner suggests that the court below "destroy[ed]" international law by looking to Indonesian law to determine whether an Indonesian government agent had actual authority to issue notes that purported to obligate the Indonesian Government. Pet. 19-20. Petitioner does not clarify how the court of appeals, by applying a U.S. statute to determine whether jurisdiction may exist in U.S. courts over a foreign state, has had any effect whatsoever on international law, much less to the extent of "destroying" it. Petitioner's assertion is particularly questionable where, as is the case here, the United States is not even a signatory to the treaty Petitioner cites as the international law that forms the basis of his claim.[19]

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[19] Pet. 19 (citing Convention for the Settlement of Certain Conflicts of Law in connection with Bills of Exchange and Promissory Notes, June 7,

More importantly, however, treaty provisions as to the enforcement of a note have no relevance to the holding of the court of appeals that an agent of a foreign state acting outside the scope of his authority and in violation of law does not have the requisite authority to bind the foreign state for purposes of establishing jurisdiction under the FSIA. The actual authority empowering an agent of a foreign state is necessarily determined by reference to the laws and other sources of authority of the foreign state. As cases involving the domestic sovereign teach, only the state can delegate authority to its agents. *See, e.g., Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power."); *The Floyd Acceptances*, 74 U.S. 666 (1868) (promissory notes not authorized by statute are not binding on the Government). Therefore, the court of appeals properly looked to the law of Indonesia to determine the actual authority of Indonesia's agents, consistent with its approach to this question in previous cases. *See Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106-07 (9th Cir. 1990) (looking to Philippine Executive Order as evidence of actual authority). Syrian law, which Petitioner urges as the applicable law (Pet. 19), also has no relevance whatsoever to the fundamental question whether the Indonesian agents had actual authority under Indonesian law to issue notes purporting to bind the Indonesian Government.

Nor is there any support for Petitioner's hyperbolic claim that, as a result of the court of appeals' decision, this Court's holding in *Republic of Argentina v. Weltover*, 504 U.S. 607,

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1930, 143 L.N.T S. 317). The United Nations updates its website regularly to reflect the status of multilateral treaties deposited with the Secretary-General. As of March 13, 2002, the United States has not acceded to or ratified this agreement. http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/Treaty-8.asp.

612-617 (1992), "is dead." Pet. 20. It is undisputed in this case that the issuance of foreign notes is a commercial activity within the meaning of *Weltover*. App., *infra*, 8a-9a (*Phaneuf I*). Petitioner's argument that foreign governments will undermine *Weltover* by claiming at some later date that "inconvenient" financial transactions were unauthorized (Pet. 20) is speculation that diverges widely from the circumstances of this case. The court of appeals concluded that the notes were unauthorized and illegal, and that the Indonesian Government disclaimed responsibility for the alleged notes upon learning of their existence a few months after their creation, widely publicized that disclaimer and has consistently refused to honor the notes since that time. App., *infra*, 2a (*Phaneuf I*). The conclusion of the courts below that the unauthorized issuance of the notes was not commercial activity "of the foreign state," App., *infra*, 23a (Mar. 31, 1999 Order); *see also* Pet. App. A-32—A-35 (*Phaneuf II*), presents no threat whatsoever to *Weltover*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CAROLYN B. LAMM *
FRANCIS A. VASQUEZ, JR.
ANNE D. SMITH
FRANK PANOPOULOS
NICOLE ERB
WHITE & CASE LLP
601 Thirteenth Street, N.W.
Suite 600 South
Washington, D.C. 20005-3807
(202) 626-3600

Counsel for Respondents

* Counsel of Record

March 15, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 95-17131

CURTIS A. PHANEUF,
Plaintiff-Appellee,
v.
REPUBLIC OF INDONESIA, A FOREIGN STATE; NATIONAL DEFENSE SECURITY COUNCIL OF THE REPUBLIC OF INDONESIA—JAKARTA, AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE; H.A. CHALID MAWARDI,
Defendants-Appellants.

Argued and Submitted Nov. 4, 1996.
Decided Feb. 7, 1997.

Before: RONEY,[*] Senior Circuit Judge, BEEZER and TROTT, Circuit Judges.

BEEZER, Circuit Judge:

The Republic of Indonesia, the National Defense Security Council of the Republic of Indonesia and H.A. Chalid Mawardi (collectively "defendants") appeal the district court's order denying the defendants' motion to dismiss on the basis of sovereign immunity and for lack of venue. We have jurisdiction over the district court's denial of the motion to dismiss pursuant to the collateral order doctrine. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir.1991), *cert. denied,* ___ U.S. ___, 115 S.Ct. 581, 130 L.Ed.2d 496 (1994). Jurisdiction does not exist to review the district court's refusal to dismiss for lack of venue. *American Concrete Agric. Pipe Assn v. No-Joint Concrete Pipe Co.*, 331 F.2d 706, 709 (9th Cir.1964). We reverse and remand.

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[*] The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit sitting by designation.

I

Plaintiff Curtis A. Phaneuf holds several promissory notes allegedly issued by the National Defense Security Council of the Republic of Indonesia ("NDSC"). These notes are part of approximately 505 promissory notes created by several then-members of the NDSC and valued at over three billion U.S. dollars ("NDSC notes"). The notes bear the signatures of two NDSC members and the NDSC crest. The principal maker of the notes, Ibnu Hartomo, traded the "NDSC notes" for promissory notes issued by Hassan Zubaidi, a Syrian based financier. In August 1985, defendant Mawardi, then Indonesia's ambassador to Syria, participated in a signing ceremony in Damascus. At the ceremony Mawardi purportedly confirmed that Hartomo represented the Indonesian government and that the "NDSC notes" were "Official/ Governmental." Zubaidi's notes were later discovered to be worthless.

The Republic of Indonesia claims that it did not know about the "NDSC notes" until late in 1985, at which time it promptly determined that these notes were unauthorized and invalid under Indonesian law. In January 1986, the NDSC's Secretary General informed Bank Indonesia that neither the NDSC nor any of its officials had authority to issue promissory notes and that the "NDSC notes" were invalid. Bank Indonesia then sent communications to financial institutions advising that Indonesia had detected unauthorized promissory notes allegedly issued by the NDSC. In April 1987, the NDSC issued a press release which disavowed NDSC responsibility for the notes, stating that responsibility lay with the persons who signed the notes. Bank Indonesia has continuously refused to honor the notes.

Phaneuf brought this action to enforce payment on the notes in his possession. The defendants moved to dismiss based on lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). The district court denied the defendants' motion to dismiss, stating that defendants had not established a prima facie case of immunity under the FSIA.

Defendants contend that the district court erred in denying their motion to dismiss because: (1) they established a prima facie case of immunity under the FSIA; (2) the commercial activity exception to the FSIA does not apply to Phaneuf's claim; and (3) venue is improper in the District of Arizona.

II

The FSIA is the sole basis of subject matter jurisdiction over suits involving foreign states and their agencies and instrumentalities. *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 323 (9th Cir.1996). Under the FSIA, foreign states are immune from suit unless one of the enumerated exceptions to the Act applies. 28 U.S.C. §§ 1330, 1604-05. The existence of subject matter jurisdiction under the FSIA is a question of law reviewed de novo. *Randolph*, 97 F.3d at 323.

III

The district court held that it currently had subject matter jurisdiction, but stated that it might revisit the issue later in the trial based on further discovery. Subject matter jurisdiction under the FSIA, however, must be decided before the suit can proceed. *Security Pac. Nat'l Bank v. Derderian*, 872 F.2d 281, 283-84 (9th Cir.1989). Immunity under the FSIA is not only immunity from liability, but immunity from suit. *Companía Mexicana de Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir.1988). The district court improvidently postponed its final determination of subject matter jurisdiction under the FSIA.

IV

The district court denied the defendants' motion to dismiss holding that the defendants had not established a prima facie case of immunity. The district court relied on a footnote in *Siderman de Blake v. Republic of Argentina* in determining the prima facie requirements for sovereign immunity. *See* 965 F.2d 699, 708 n. 9 (9th Cir.1992) (citing *Meadows v. Dominican Republic*, 817 F.2d 517, 522 (9th Cir.), *cert. denied*, 484 U.S. 976, 108 S.Ct. 486, 487, 98 L.Ed.2d 485 (1987)), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). Footnote nine of *Siderman de Blake* states:

> Where . . . . the plaintiff alleges in his complaint that his claim is based on a foreign state's strictly commercial acts, the defendant must establish a prima facie case that it is a sovereign state and that the plaintiff's claim arises out of a public act. This proof establishes a presumption that the foreign state is protected by immunity.

Id.

In its order, the district court stated that defendants failed to show that the "acts complained of arise out of a public act." Defendants had argued to the district court that the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), did not apply because they had not participated in the issuance of the promissory notes. The district court concluded that the defendants could not "consistently argue that they are entitled to immunity (as a foreign sovereign for their sovereign acts) [under] the FSIA and, at the same time, argue that the acts alleged were not sovereign so as to defeat its exceptions."

We, however, have never required a defendant to establish that a plaintiff's claim arose from a public act. We did not engage in a public act inquiry in either *Siderman de Blake* or *Meadows v. Dominican Republic*, upon which *Siderman de Blake* relies, because neither case concerned whether the defendants had demonstrated a prima facie case of immunity. *Siderman de Blake*, 965 F.2d at 707-08 (discussing whether plaintiffs met their burden of production that exceptions to the FSIA applied); *Meadows*, 817 F.2d at 523 (holding that the defendants had not met their final burden of persuasion that the commercial activity exception did not apply). The suggestion in *Siderman de Blake* and *Meadows* that the FSIA prima facie case includes a public act requirement is dicta, and as such holds no precedential value.

In other existing precedent, defendants have established their prima facie entitlements to sovereign immunity by proving only that they qualified as "foreign state[s]" under 28 U.S.C. § 1603 (a)-(b). We did not require these defendants to demonstrate that the plaintiffs' claims arose from a public act. *Export Group v. Reef Indus.*, 54 F.3d 1466, 1470 (9th Cir.1995) (citing *Meadows*, 817 F.2d at 522-23); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1459-60 (9th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 187, 133 L.Ed.2d 124 (1995); *cf. Randolph*, 97 F.3d at 324 (discussing the shifting of the burden of production under the FSIA without addressing a prima facie public act requirement and citing *Siderman de Blake*, 965 F.2d at 707-08).

Further, the FSIA dictates that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607." 28 U.S.C. § 1604; *see Compania Mexicana de Aviacion*, 859 F.2d at 1359 ("We lack both statutory subject matter and personal jurisdiction over any claim against a foreign sovereign unless one of the Act's exceptions applies. . . ."). Sections 1605 through 1607 of Title 28 outline the only exceptions to the Act. Requiring a foreign state to prove a public act conflicts with the plain language of the statute: a foreign state is immune from suit unless one of the enumerated exceptions applies. There is no exception for non-public acts.

The legislative history of the FSIA also does not compel the conclusion that a defendant must prove a public act to establish a prima facie case of immunity. The suggestion in *Meadows* of a public act requirement was based, in part, on a House Report which states:

> [T]he burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607.

H.R.Rep. No. 1487, 94th Cong., 2d sess. This legislative history, however, clarifies only that the defendant bears the burden of establishing its immunity, including the burden of proof that no exception applies. It does not necessitate a prima facie showing of a public act. The phrase "public act" is used to describe acts that do not fall within the enumerated exceptions to the FSIA.

Moreover, requiring a prima facie showing of a public act would prevent the defendants here from asserting a valid argument against the application of the commercial activity exception. The language of the commercial activity exception requires not only that there be "commercial activity", but also that there be commercial activity "of the foreign state." 28 U.S.C. § 1605(a)(2). Defendants should be permitted to argue against the application of the exception on the grounds that they did not act: that there was no "commercial activity *of the foreign state*." *Id.* (emphasis added).

We conclude that the FSIA does not require the defendants to prove a public act to establish a prima facie case of immunity. Instead, they are entitled to a presumption of immunity if they are foreign states within the meaning of the Act. *Gates*, 54 F.3d at 1459-60; *Export Group*, 54 F.3d at 1470.

As conceded by Phaneuf, both Indonesia and the NDSC qualify as foreign states under the FSIA.[1] The district court erred in determining that the Republic of Indonesia and the NDSC had not established a prima facie case of sovereign immunity.

We consider Mawardi's entitlement to a presumption of immunity separately. The district court held that Mawardi was not entitled to a presumption of immunity because he, along with the other defendants, had failed to establish a public act. As discussed above, the district court erred in requiring the defendants to prove a public act. Nonetheless, Mawardi may not be entitled to a presumption of immunity if he was acting outside the scope of his official authority. In *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.)*, we held that the FSIA applies to a foreign official acting in an official capacity, but does not apply to an official acting beyond the scope of the actor's authority. 978 F.2d 493, 497 (9th Cir.1992) (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103-06 (9th Cir. 1990) (holding that government officials fall within the definition of an "agency or instrumentality of a foreign state")), *cert. denied*, 508 U.S. 972, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993). In *Trajano*, we defined "beyond the scope of the official's authority" to include anything the sovereign has not empowered the official to do. *Id.* Because the district court did not make any factual findings as to either

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[1] A "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality" of a foreign state is defined as an entity:

> (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof . . . and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b). The Republic of Indonesia is a foreign state and the NDSC meets the definition of an "agency or instrumentality" of a foreign state.

Mawardi's actions or the scope of his authority, we remand this issue to the district court. If the district court finds that Mawardi's actions were within the scope of his authority, then Mawardi is entitled to a presumption of immunity under the FSIA; if Mawardi acted without authority, the FSIA cannot shield him from suit in his individual capacity.[2]

V

Because the defendants, with the exception of Mawardi, have established a prima facie case of immunity, the burden of production shifts to the plaintiff to offer evidence that an exception applies. *See Randolph*, 97 F.3d at 324. Phaneuf submitted affidavits and other evidence to support the theory that the NDSC members had either actual or apparent authority to issue the promissory notes. Phaneuf asserts that defendants' actions fall within the third clause of the commercial activity exception. That provision states that a foreign sovereign is not immune from jurisdiction when the action is based:

> upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

Because Phaneuf offered evidence that the commercial activity exception applies, the defendants bear the burden of proving by a preponderance of the evidence that the exception does not apply. *See Randolph*, 97 F.3d at 324; *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir.1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988).

The issuance of sovereign debt is a commercial act which falls within the exception claimed by Phaneuf. *Republic of*

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[2] Phaneuf is suing Mawardi in his official capacity and not as an individual.

Argentina v. Weltover, Inc., 504 U.S. 607, 612-617, 112 S.Ct. 2160, 2165-68, 119 L.Ed.2d 394 (1992). Defendants concede this issue.

Defendants maintain, however, that the commercial activity exception does not apply because they are not responsible for the issuance of the notes. They contend there was no "commercial activity *of the foreign state*." 28 U.S.C. § 1605(a)(2) (emphasis added). Defendants argue they are not bound by the actions of the former NDSC members or Ambassador Mawardi because these government officers exceeded the scope of their authority in issuing and certifying the validity of the notes. The question is whether an agent of a foreign state must have acted with *actual* authority to invoke the commercial activity exception against a foreign state, or whether *apparent* authority suffices.[3]

In interpreting the FSIA, we first look to the plain meaning of the language employed by Congress. *Straub v. A P Green, Inc.*, 38 F.3d 448, 452 (9th Cir.1994). The language of the commercial activity exception compels the conclusion that only evidence of actual authority can be used to invoke that exception. All three clauses of the exception require "a commercial activity *of the foreign state.*" 28 U.S.C. § 1605(a)(2) (emphasis added). "[C]ommercial activity *of the foreign state*" clearly entails commercial activity in which the foreign state engaged. Because a foreign state acts through its agents, an agent's deed which is based on the actual authority of the foreign state constitutes activity "of the foreign state."

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[3] We distinguish the issue here from the inquiry undertaken to determine whether an agency or instrumentality of a foreign state is the "alter ego" of the foreign state. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627-633, 103 S.Ct. 2591, 2600-03, 77 L.Ed.2d 46 (1983) ("*Banec*"); *Gates*, 54 F.3d at 1460 n. 1. Normally, we accord a presumption of independence to an agency or instrumentality of the foreign state; this presumption can be overcome, however, when the level of state control is such that the acts of the governmental agency are in effect the acts of the state. *Banec*, 462 U.S. at 629-34, 103 S.Ct. at 2601-04 (applying presumption in liability context); *Gates*, 54 F.3d at 1460 n. 1.

Our concern here, however, is not the level of control a foreign state must exercise over an agency before we will attribute the misdeeds of that agency to the foreign state. Rather, we focus on whether the action of an agent that exceeds the scope of his authority should be attributable to the foreign state.

When an agent acts beyond the scope of his authority, however, that agent "is not doing business which the sovereign has empowered him to do." *Chuidian*, 912 F.2d at 1106 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949)). If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no "activity of the foreign state."

We assume that "the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Export Group*, 54 F.3d at 1473 (internal quotations omitted). We are not to imply exceptions. *Id.* If Congress had intended the commercial activity exception to apply to an agent's acts committed without actual authority it could have so indicated in the language of the exception. Instead, the plain meaning of the language "commercial activity of the foreign state" illustrates that Congress intended for the exception to apply only in cases of actual authority.

Our holdings in *Chuidian* and *Trajano* support this conclusion. *Chuidian*, 912 F.2d at 1103, 1106; *Trajano*, 978 F.2d at 497-98. In *Chuidian* we held that an agent of a foreign state acting outside the scope of his authority is not entitled to immunity under the FSIA. 912 F.2d at 1106. A corollary to this principal must be that the foreign state retains its immunity when its agent acts outside the scope of his authority. "'Where an officer's powers are limited . . . his actions beyond those limitations are considered individual and not sovereign actions.'" *Id.* (quoting *Larson*, 337 U.S. at 689, 69 S.Ct. at 1461).

Further, in *Trajano* we held that the defendant was not entitled to immunity because the acts were taken without official mandate and thus could not "have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA." 978 F.2d at 498. Therefore, unofficial acts are also not acts of a "foreign state." 28 U.S.C. § 1603(a) (defining "foreign state" to include an "agency or instrumentality of a foreign state"). The language "commercial activity of the foreign state" excludes an agent's unofficial acts, i.e., acts taken without actual authority.

Chuidian drew support for its conclusion by references to the sovereign immunity of the United States. *Chuidian*, 912 F.2d at 1101-02, 1106. Further comparison to United States immunity buttresses the reading of an actual authority requirement into the commercial activity exception of the FSIA. When dealing with a purported agent of the United States, the third party bears the risk that the agent is acting outside the scope of the agent's authority, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947), even if the third party reasonably believes the agent has authority. *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir.1981). Moreover, the government can be estopped from asserting immunity only when its agent has acted within the scope of authority. *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir.1981). These precedents support the conclusion that evidence of apparent authority should not be sufficient to invoke the FSIA's commercial activity exception.

We hold that an agent must have acted with actual authority in order to invoke the commercial activity exception against a foreign state.[4] We express no opinion as to whether the issuers of the "NDSC notes" or Ambassador Mawardi acted with actual authority. We remand to the district court to determine whether the commercial activity exception applies to the defendants.

VI

Defendants also argue that venue is improper in the District of Arizona. Phaneuf claims venue under 28 U.S.C. § 1391(f)(1).[5] Although neither party disputes appellate jurisdiction over this issue, we consider our jurisdiction sua sponte. *Benavidez v. Eu*, 34 F.3d 825, 830 (1994).

In *American Concrete Agric. Pipe Ass'n v. No-Joint Concrete Pipe Co.*, we held that an order denying a motion to dismiss for want of venue is interlocutory and not appealable under 28 U.S.C. § 1291. 331 F.2d at 709. We do not have jurisdiction over the district court's order denying defendants' motion to dismiss for lack of venue.

REVERSED AND REMANDED.

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[4] Our conclusion that the commercial activity exception may be invoked against a foreign state only when its agents have acted with actual authority contradicts a Second Circuit case, *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189 (2d Cir.1989). In that case the court instructed the district court to hold on remand that jurisdiction existed over the foreign state if the district court found that the foreign state's ambassador acted with apparent authority. *Id.* at 194-96. The court, however, seems to have assumed the appropriateness of invoking the commercial activity exception based on apparent authority. The court gave no analysis or explanation of its statements regarding apparent authority.

[5] Section 1391(f)(1) provides that venue is proper "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of that of the action is situated."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed Mar. 31, 1999]

CV-94-746-TUC WDB

CURTIS A. PHANEUF,

Plaintiff,

v.

THE REPUBLIC OF INDONESIA, A FOREIGN STATE, THE NATIONAL DEFENSE SECURITY COUNCIL OF THE REPUBLIC OF INDONESIA—JAKARTA, AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE. H.A. CHALID MAWARDI, AMBASSADOR OF INDONESIA,

Defendants.

ORDER

Pending before the Court are Defendants' October 17, 1997 Motion to Dismiss and Plaintiff's October 17, 1997 Memorandum on Remand Regarding Authority. The motions are fully briefed and a hearing was held before the Honorable Judge William Browning on November 19, 1998.

I. BACKGROUND

This action, based on breach of contract, is brought to collect on certain promissory notes purportedly issued on behalf of the Indonesian government. These notes, issued in 1985, each have a face value of up to twenty-five million dollars ($25,000,000). Plaintiff possesses seven notes: 219/AA, 220/AA, 279/AA, 282/AA, 283/AA, 284/AA, and 285/AA. These notes were issued, along with approximately 500 other promissory notes valued at over three billion dollars, by several then-members of the National Defense Security Council of the Republic of Indonesia ("NDSC"). A copy of a note submitted to the Court shows that it: (1) was issued by the NDSC; (2) was signed by Dr. Ibnu Hartomo (Deputy of Development for the NDSC) and Mr. S. Soebagyo Soedewo (Deputy of Long Term Planning for the NDSC); (3) was "confirmed" as "Official/Governmental" by H.A. Chalid Mawardi, the Indonesian ambassador to Syria (now former); (4) was issued to the "Central Establishment for Trade and Investment—Beirut And Or Their Bearer without any Recourse"; (5) matured on May 15, 1993, but allegedly was extended for one year; and (6) was to be paid in New York in United States currency. In November of 1985, defendant Mawardi, then Indonesia's ambassador to Syria, participated in a signing ceremony in Damascus. At that ceremony Mawardi purportedly confirmed that Hartomo represented the Indonesian government and the NDSC notes were "Official/ Governmental." The principal maker of the notes, Dr. Ibnu Hartomo, President S. Suharto's brother-in-law, traded the NDSC notes for promissory notes issued by Hassan Zubaidi, a Syrian based financier. The notes issued by Zubaidi were later discovered to be worthless.

The Republic of Indonesia alleges that it did not know about the NDSC notes until late 1985, at which time it determined that they were not properly authorized and were, thus, invalid under Indonesian law. In January 1986, the NDSC's Secretary General informed Bank Indonesia that neither the NDSC nor any of its officials had authority to issue promissory notes and that the NDSC notes were invalid. (Zarkaski Aff. ¶ 9-13, (2/15/95 Doc. #25)). In April 1987, the NDSC issued a press release that disavowed NDSC responsibility for the notes, saying that the responsibility lay with the persons who signed the notes. *Id.* Dr. Ibnu Hartomo has filed an affidavit stating that the NDSC and officials of the NDSC did not have actual authority to issue debt on behalf of the NDSC or the Republic of Indonesia. (Ex. A Defs' 10/17/97 Mot. to Dismiss, Doc.

#61: Ex. #8 Hr'g 11/18/98). Furthermore, Hartomo states in his affidavit that he knew he lacked actual authority when he signed the notes. *Id.* Bank Indonesia has continuously refused to honor the notes.

Defendants include: (1) the Republic of Indonesia; (2) the National Defense Security Council (of the Republic of Indonesia), Jakarta; and (3) H.A. Chalid Mawardi, the (former) Ambassador of Indonesia to Syria.

In 1987, the Panorama Foundation bought the seven notes at issue. From what can be gathered from the documents submitted, the transfer of the notes at issue was facilitated by a Mr. Hans Beeg, a German lawyer, who supposedly was handed the notes personally by Zubaidi. Beeg then transferred the notes to an account in Hong Kong in the name of the Panorama Foundation, which purportedly paid seventy million dollars ($70,000,000) for the notes. Confirmation of receiving the seventy million dollars for the notes was made by Mr. Hans Beeg on May 28, 1987. (Ex. #9 to Pl's 12/15/94 Hr'g Mem., Doc. #11). The seven notes were delivered to Plaintiff by a Sir Warren Chang, Chairman of the Panorama Foundation. Plaintiff brought this action to enforce payment on the notes in his possession.

On February 15, 1995, Defendants filed a motion to dismiss based on lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). On September 25, 1995, the Court denied the Defendants' motion to dismiss, finding that Defendants failed to establish a *prima facie* case that the FSIA applied because Defendants did not establish that there was a public act. The September 25, 1995 Order also stated that "as to venue, *forum non conveniens*, and standing, the Court believes that further development of the record is necessary to fairly resolve the arguments."

Defendants appealed contending that the district court erred in three ways: (1) Defendants had established a *prima* *facie* case of immunity under FSIA, (2) the commercial activity exception to FSIA does not apply to Plaintiff's claim, and (3) venue is improper in the District of Arizona. The Ninth Circuit did not review the district courts refusal to dismiss for lack of venue because they lacked jurisdiction to do so. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 304 (9th Cir. 1997). The Ninth Circuit reversed the district court and held that Indonesia and NDSC had established a *prima facie* case of immunity under FSIA. *Phaneuf*, 106 F.3d at 306, 308. In addition, the Ninth Circuit held that an agent of a foreign state must have acted with actual authority for a plaintiff to invoke the commercial exception to FSIA's immunity against a foreign state. *Id.* The case was remanded on two issues: (1) were Mawardi's actions within the scope of his authority entitling him to immunity under FSIA, and (2) does the commercial activity exception apply to the Defendants. *Phaneuf*, 106 F.3d 302.

On July 7, 1997, the Court issued a scheduling order allowing the parties to file simultaneous memorandum on the issue of jurisdiction. Plaintiff titled his memorandum as Memorandum on Remand Regarding Authority and Defendants titled theirs as a Motion to Dismiss. In addition, Defendants have filed three motions to strike which the Court denied on September 30, 1998 pursuant to Rule 44.1 of the Federal Rules of Civil Procedure.

II. DEFENDANTS' MOTION TO DISMISS

The Law of the Case

This case comes before the Court on remand from the Ninth Circuit. *Phaneuf*, 106 F.3d 302. FSIA, codified at 28 U.S.C. § 1303(a), provides the sole basis of subject matter jurisdiction over suits involving foreign states and their agencies and instrumentalities. *Id.* at 304. A foreign state must only prove that it qualifies as a "foreign state" in order to be immune from jurisdiction of the courts of the United States. *Id.* at 305-06. There is no requirement that a foreign state demonstrate that the Plaintiff's claim arose from a public act. *Id.* "FSIA dictates that a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607.'" *Phaneuf*, 106 F.3d at 305 (citing 28 U.S.C. § 1604; *Compania Mexicana de Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1359 (9th Cir. 1988)). A foreign state includes political subdivisions and agencies or instrumentalities of a foreign state. *Phaneuf*, 106 F.3d at 306 (citing 28 U.S.C. § 1603(b)). "The Republic of Indonesia is a foreign state and the NDSC meets the definition of an 'agency or instrumentality' of a foreign state." *Phaneuf*, 106 F.3d at 306 n.1. Thus, Defendants, with the exception of Mawardi, have established a *primia facie* case of sovereign immunity. *Phaneuf*, 106 F.3d at 306.

FSIA only applies to a foreign official acting in an official capacity. *Id.* Therefore, Mawardi is only entitled to immunity if he was acting in an official capacity, not if he was acting beyond the scope of his official authority. *Id.* The Ninth Circuit remanded the issue of whether Mawardi's actions were within the scope of his authority, entitling him to the presumption of immunity under the FSIA. *Id.* Because Mawardi was sued only in his official capacity, if the Court finds that he was acting outside the scope of his authority there is no official capacity liability and he should be dismissed from the action. In addition, the parties have stipulated that the only issue before the Court is whether the Defendants acted with actual authority and they did not address the issue of Mawardi's actions separately. This is appropriate because if Mawardi was acting with actual authority he would be protected by FSIA to the same degree as the other defendants. Filing suits against a government official in official capacity is equivalent to filing suit against the government itself. *Monell v. New York City Dept. Of Social Services*, 4365 U.S. 658, 690 n.55 (1978). Thus, joining Mawardi in his official capacity was superfluous.

The Ninth Circuit established the law of the case to be: (1) Indonesia and the NDSC established a *prima facie* case of immunity under the FSIA and the burden of production shifted to Plaintiff to offer evidence that an exception applies, (2) Plaintiff offered evidence that the commercial activity exception applies, thus, (3) Indonesia and the NDSC bear the burden of proving by a preponderance of the evidence that the exception does not apply. *Phanuef*, 106 F.3d at 307. Under the commercial activity exception a foreign state is not immune from the jurisdiction of courts of the United States in any case in which the claim is based upon certain types of commercial activity of the foreign state which causes an effect in the United States. *See* 28 U.S.C. § 1605(a)(2). The issuance of sovereign debt is a commercial act which falls under this exception. *Phaneuf*, 106 F.3d at 307. However, the commercial activity exception applies only if the commercial acts are those of the foreign state and "Defendants should be permitted to argue against the application of the exception based on the fact that they did not act." *Id.* at 306. The Ninth Circuit held that the commercial exception only applies when agents have acted with actual authority. *Phaneuf*, 106 F.3d at 308 (contradicting the Second Circuit which held, in *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189 (2d Cir. 1998), that apparent authority was sufficient). "Because a foreign state acts through its agents, an agent's deed which is based on the actual authority of the foreign state constitutes activity of the foreign state. When an agent acts beyond the scope of his authority, however, that agent "is not doing business which the sovereign has empowered him to do." *Phaneuf*, 106 F.3d at 307-08 (citing *Chuidian v Philippine National Bank et al.*, 912 F.2d 1095, 1106 (9th Cir. 1990)). The issue before the

Court is whether the NDSC officials and/or H.A. Chalid Mawardi had actual authority to issue the NDSC notes.[1]

Defendants' Arguments

Defendants argue that the commercial exception does not apply because *Defendants* did not issue the notes in question. The NDSC officials who signed the notes were not authorized to issue the notes and incur foreign debt on behalf of the government or the NDSC. Thus, because such unauthorized acts are not attributable to Indonesia or the NDSC, the acts are not a commercial activity of a foreign state and fall outside of the exception. To determine whether actual authority exists, the Court must look only to the statutes and regulations of the sovereign because only Indonesian law speaks to the issue of actual authority of the Indonesian government agencies and agents to issue promissory notes on behalf of Indonesia.

Plaintiff's Argument

Plaintiff argues that the Ninth Circuit stated that *Phaneuf* has offered evidence that the commercial exception applies so the burden is on Defendants to prove by a preponderance of the evidence that the exception does not apply. *Phaneuf*, 106 F.3d at 306. The affidavits presented by Indonesia are not credible because Defendants' lawyers have been dishonest and the other affidavits are contradicted by Plaintiff's exhibits. For example, Plaintiff's Ex. #13 filed with his original Opposition to Motion to Dismiss, a newspaper article in the Far Eastern Economic Review stating that General Achmad signed the notes, contradicts General Achmad's affidavit stating that he never signed any document authorizing individuals to issue promissory notes on behalf of the NDSC or the Republic of Indonesia. Additionally, Defendants' allegations that there was widespread dissemination of the repudiation of the NDSC notes is contradicted by many important entities' lack of knowledge on this issue. Plaintiff further alleges that all the persons involved in the issuance of the NDSC notes were not agents but officers of a government agency. In this case. instead of Indonesia acting directly, it acted through its alter ego, the NDSC.

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[1] This would appear to be a factual issue precluding dismissal at this early stage in the proceeding. However, on a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the Court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings. *See Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 39 (9th Cir. 1978). Additionally, Fed. R. Civ. P. 44. 1 gives courts the freedom to consider all relevant material when deciding issues of foreign law.

Actual Authority

A sovereign may not be held liable for the acts of its agents absent the existence of actual authority. *Phaneuf*, 106 F.3d at 308. In reaching this decision the Ninth Circuit relied on a long line of cases involving the sovereign immunity of the United States and analogized this case to those where the authority of a United States' agent was at issue. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Federal Crop Inc. Corp. v. Merrill*, 332 U.S. 380, 384, (1947); *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir. 1981); *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981); *see also Trajano v. Marcos*, 978 F.2d 493, 498 (1992) (applying the foregoing concepts to foreign sovereigns); *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990) (same). Those who rely on representations of authority made by purported agents of the government bear the risk that the agent is acting outside the scope of his authority. *Phaneuf*, 106 F.3d at 308 (citing *Merrill*, 332 U.S. at 384).

The Ninth Circuit in *Chuidian*, extended this concept into international law by looking to a Philippine Executive Order to find actual authority. *See* 912 F.2d at 1097. Additionally, the

Ninth Circuit found that "[w]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Chuidian*, 912 F.2d at 1106 (citing *Larson*, 337 U.S. at 689). For example, in *Trajano*, the Ninth Circuit found that when the daughter of Philippine President Marcos tortured to death a young man, her actions could not have been taken with any official mandate and, therefore, were not an act of an agent or instrumentality of the government. *Trajano*, 978 F.2d at 498. Thus, Marcos was not immune under FSIA because FSIA does not immunize act of individuals outside the scope of their official duties. *Id.* at 498. The Ninth Circuit extended this analogy to NDSC in this case stating that acts taken without an official mandate could not "have been acts of an agent or instrumentality of a foreign state within the meaning of FSIA." *Phaneuf*, 106 F.3d at 308 (citing *Trajano*, 978 F.2d at 498). Furthermore, "[t]he language 'commercial activity of the foreign state' excludes an agent's unofficial acts, i.e., acts taken without actual authority." *Phaneuf*, 106 F.3d at 308. Thus, if the Court finds that Hartomo and Soedewo, the officials who signed the notes, as well as Mawardi, acted outside the scope of their authority, the commercial exception to FSIA's immunity is not triggered and there is no jurisdiction.

Indonesia follows the civil law tradition, thus, law exists only to the extent it is published in the form of statutes and decrees. (Komar Decl. ¶ 3 (filed 2/15/95 Doc. # 25)). The principal regulations concerning foreign credits, loans that give rise to an obligation to repay funds abroad in foreign currency such as Plaintiff's notes, are Presidential Decree No. 59 of 1972 ("59/1972"), Presidential Decree No. 17 of 1978 ("17/1978"), and Presidential Decree No. 261 of 1973 ("261/1973"). (Komar Decl. ¶¶ 4,5,6 (filed 2/15/95 Doc. #25)). The execution of notes or bonds is controlled by Decree 17/1978 authorizing only the Ministry of Finance to issue notes or bonds in the name of the Republic of Indonesia. (Defs'. 10/17/97 Mot. to Dismiss p.8, Doc. #61 citing to

Komar Decl. ¶ 4, (filed 2/14/95 Doc. #25)). These decrees illustrate that foreign credits can be obtained and received only by the designated representatives of the Indonesia government, the Ministry of Finance and the Bank of Indonesia. (Zarkaski Decl. ¶ 7 and Komar Decl. ¶ 5 (filed 2/15/95 Doc. #25)). Additionally, the NDSC is statutorily defined as a non-departmental institution by Article 2(1) of Decree 59/1972. (Komar Decl. ¶ 9 Doc. #25). Under Decree 59/1972 Article 2(1) non-departmental governmental institutions may not seek or accept offers of foreign credit. (Komar Decl. ¶ 6, 9 Doc. #25).

Thus, the NDSC had no authority to issue promissory notes. *Id.* Furthermore, Ibnu Hartomo, whose signature appears on the notes admits he had no authority to issue the notes and knew this when he signed them. (Hartomo Decl. ¶ 1 (Ex. A. filed 10/17/1997)). Plaintiff alleges that General Achmad Wiranatakusumah, Secretary General of the NDSC during the relevant period, signed a letter of authorization for the issuance of the notes. Defendant contends that this letter is a forgery. Regardless, Plaintiff's argument is unavailing because General Achmad Wiranatakusumah had no authority to issue promissory notes or authorize others to issue promissory notes. (Achmad Aff. 3/23/98, Doc. #85). Moreover, Ambassador Mawardi was a diplomatic representative and Presidential Decree No. 51/1076 strictly limits the scope of authority of ambassadors to matters within the diplomatic sphere. (Supp. Komar Decl. ¶ 24 (filed 5/15/95 Doc #35). Reviewing the relevant regulatory framework, it is clear that neither the NDSC, any of its officers, or Mawardi had actual authority to issue the NDSC notes.

III. CONCLUSION

From the facts of this case the extent of the Indonesian government's involvement in the issuance of the NDSC notes is unclear. However, the court must take into consideration international systems including respect for the actions taken by foreign sovereigns, principles of comity between nations and the basic policies underlying FSIA. *See Chuidian*, 912 F.2d at 1104; *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983). Plaintiff has presented numerous exhibits but he has not effectively organized them or demonstrated their relationship to his arguments. Furthermore, he often fails to identify the precise location of the exhibit he is referring to, and due to the sheer number of exhibits filed over many years it is a waste of judicial resources to attempt to decipher which argument each exhibit would support and how that exhibit supports Plaintiff's arguments. Moreover, his evidence is predominantly newspaper articles. Although Plaintiff could have pursued traditional methods of obtaining discovery (i.e., subpoenas or motions to compel) in light of Rule 44.1 and Rule 12(b)(1) of the Federal Rules of Civil Procedure, there is no record of Plaintiff seeking the Court's assistance in his discovery difficulties.

Nonetheless, reviewing the evidence presented by Plaintiff, it is apparent that the Defendants have proven by a preponderance of the evidence that the commercial exception does not apply in this action. Hartomo, Soedewo, and Mawardi were not authorized to issue the promissory notes. General Achmad Wiranatakusumah did not have the authority to authorize the issuance of the notes. Thus, such unauthorized acts are not attributable to Indonesia or to the NDSC. Therefore, the issuance of the NDSC notes was not a "commercial activity of the foreign state." Because the National Defense Security Council, the Republic of Indonesia, and H.A. Mawardi must be granted immunity pursuant to FSIA, this Court lacks jurisdiction to entertain a suit for breach of contract. 28 U.S.C. § 1604. . Thus, the Court will grant the motion to dismiss for lack of subject matter jurisdiction.

Accordingly,

IT IS ORDERED that Defendants' October 17, 1997 Motion to Dismiss is GRANTED. IT IS FURTHER ORDERED that this case is DISMISSED with prejudice and all pending motions are denied as moot.

Dated this 30th day of March, 1999.

/s/ William D. Browning
WILLIAM D. BROWNING
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed Feb 4, 2000]

No. CV-94-746-TUC-WDB

CURTIS A. PHANEUF,
Plaintiff,
vs.
THE REPUBLIC OF INDONESIA, A FOREIGN STATE; THE NATIONAL DEFENSE SECURITY COUNCIL OF THE REPUBLIC OF INDONESIA—JAKARTA, AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE; H.A. CHALID MAWARDI, AMBASSADOR OF INDONESIA,
Defendants.

ORDER

Pending before the Court are Plaintiff's April 9, 1999, Motion for New Trial (Motion for Reconsideration) Pursuant to Rule 59 and Defendants' October 22, 1999, Motion to Strike Plaintiff's Supplemental Exhibits to the Memorandum on Remand Regarding Authority.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action, based on breach of contract, was brought to collect on seven promissory notes allegedly issued on behalf of the Indonesian government in 1985. Each note had a face value of up to twenty-five million U.S. dollars ($25,000,000). The notes, along with 500 similar notes, were issued by several members of the National Defense Security Council ("NDSC") of the Republic of Indonesia. Specifically, they were signed by Dr. Ibnu Hartomo, Deputy of Development for the NDSC and Mr. S. Soebagyo Soedewo, Deputy of Long Term Planning for the NDSC, and "'notarized" as official by H.A. Chalid Mawardi, then Indonesia's ambassador to Syria. The Republic of Indonesia alleges that the notes were not properly authorized and invalid under Indonesian law. The Bank of Indonesia has refused to honor the notes.

Plaintiff brought an action to enforce payment on the notes in his possession. On February 15, 1995, Defendants filed a motion to dismiss, arguing this Court lacked subject matter jurisdiction to hear the case under the Foreign Sovereign Immunities Act ("FSIA"). On September 25, 1995, the Court denied the Defendants' motion to dismiss, finding that Defendants failed to establish a *prima facie* case that the FSIA applied, because they failed to establish that a public act had occurred, triggering FSIA immunity. Defendants appealed the decision, and the Ninth Circuit reversed, holding the Defendant had established a prima facie case of immunity under FSIA. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997). Additionally, the Ninth Circuit held an agent of a foreign state must have acted with actual authority for a plaintiff to invoke the commercial exception to FSIA immunity against a foreign state. *Id.* The case was remanded on two issues: (1) were Mawardi's actions within the scope of his authority entitling him to immunity under the FSIA, and (2) does the commercial activity exception apply to the Defendants. *Phaneuf*, 106 F.3d 302.

On remand, Defendants filed another motion to dismiss, which this Court granted on March 31, 1999. After reviewing evidence concerning the Indonesian governmental system and certain Presidential Decrees which mandate that foreign credit may only be obtained and received by the designated representatives of the Indonesian government, the Ministry of Finance and the Bank of Indonesia, the Court held the NDSC was not authorized to issue promissory notes. Thus, the actions of Mawardi and the NDSC were outside the scope of authority, were not attributable to the Indonesian government, and the commercial activity exception to the FSIA did not apply. The Court then dismissed this case for lack of subject matter jurisdiction.

On April 9, 1999, Plaintiff filed a Motion for New Trial and Reconsideration, and requested leave to file a delayed memorandum in support of his motion. Leave was granted and the Memorandum was fled on May 10, 1999. Plaintiff also filed a Notice of Filing Supplemental Exhibits, which Defendants moved to strike on October 22, 1999. It is the Motion for Reconsideration and Motion to Strike the Court considers today.

II. PROCEDURAL POSTURE

Plaintiff has alternatively described his April 9, 1999, Motion as a Motion for New Trial under Federal Rule of Civil Procedure 59 and a Motion for Reconsideration. In the April 9, 1999, Motion Plaintiff specifically requested a new trial under Rule 59(a). However, no trial on the merits has ever been held in this action, only a hearing on whether the Court had jurisdiction to hear the case. Accordingly, the Court must consider Plaintiff's Motion to be a motion to alter or amend a judgment under Rule 59(e) or a motion for reconsideration under Rule 60(b).

A district court has broad discretion in granting or denying a motion to alter or amend a judgment. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.l (9th Cir.1999). Generally, alterations need not be granted, "absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or there is an intervening change in the controlling law." *Id.* at 1255 (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999)). As the Plaintiff has claimed newly discovered evidence as the grounds for alteration or reconsideration, the Court will review the Motion in light of the standards required by Rule 60(b)(2).

III. THE MOTION TO STRIKE PLAINTIFF'S SUPPLEMENTAL EXHIBITS

Defendants have objected to the inclusion in the record of two Indonesian news articles and translations obtained by the Plaintiff. Among other things, Defendants note that the articles have not been entered into evidence by sworn testimony nor been verified pursuant to 28 U.S.C. § 1746, the evidence contains hearsay statements, and there is not authentication of the translations. "Consequently, the exhibits are inadmissible under the Federal Rules of Evidence." (Defendants' Motion to Strike Plaintiff's Supplemental Exhibits to the Memorandum on Remand Regarding Authority, at 2)

The Federal Rules of Evidence do not apply in this situation. Under Federal Rule of Civil Procedure 41.1, "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." F.R.C.P. 44.1; *See Universe Sales Company, Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir.1999) (when considering foreign law courts may use any relevant material without regard to whether it is admissible under the Federal Rules of Evidence). Moreover, in 1972 the reference to the Rules of Evidence was included to "free the judge, in determining foreign law, from any restrictions imposed by evidence rules. . . ." F.R.C.P. 44.1, Advisory Committee Notes, 1972 Amendment. Consequently, the Court denies Defendant's Motion to Strike the additional Exhibits.

IV. PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff has requested the Court reconsider its decision of March 31, 1999, pursuant to Rule 60(b)(2). In his motion, Plaintiff states "New evidence is now available that was not available before the November 19th hearing which destroys the Defendants' contention and the Court's reliance on the 'principle regulations' and once again seriously challenges the credibility of the Defendants, their witnesses and their attorneys." (Plaintiff's Motion for New Trial (Motion for Reconsideration) Pursuant to Rule 59 and Motion for Leave to File Delayed/Supplemental Memorandum in Support of the Motion, at 2)

To obtain relief under Rule 60(b)(2) on the basis of newly-discovered evidence, the Plaintiff must show the evidence (1) existed at the time the district court dismissed the case, (2) could not have been discovered at that time through due diligence, and (3) was "of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (per curiam) (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir.1987)).

Plaintiff fails to meet this standard for reconsideration. The Court can decipher no newly discovered evidence within Plaintiff's pleadings and exhibits. Of the twenty-six exhibits attached to Plaintiff's motion, nineteen have already been entered into the record. The seven remaining "new" exhibits do not meet the standard: Exhibit 3 is an excerpt from the transcript of the November 19, 1998, hearing; Exhibits 9, 11, and 12 are lists of people and information already within the record; Exhibit 10 consists of letters from various banks which were in Plaintiff's possession before November 19, 1998. The only arguably new evidence is Exhibit 4, a translation of a newspaper article, Exhibit 8, a letter from a librarian at the Library of Congress, and Exhibits 33 and 34, articles from Indonesian magazines. The letter from the librarian is clearly irrelevant, as it merely states that she was unable to locate certain materials in the Library of Congress' collection of Indonesian materials. As for the articles, although they were all published after the November 19, 1998, hearing, all but one was available before March 31, 1999. Thus, not only is it apparent that the bulk of this evidence is not new, neither was it unavailable. Due diligence, in the form of more extensive research, depositions, discovery requests and interrogatories, certainly should have provided the same information prior to November 19, 1998.

More importantly, however, neither the Motion for Reconsideration nor the Exhibits contain information that is of such "magnitude that production of it earlier would have been likely to change the disposition of the case." *Coastal Transfer*, 833 F.2d at 211. The articles submitted as Exhibits 33 and 34 discuss Ibnu Hartomo and Chalid Mawardi's involvement in the matter, restating the facts of the issuance of the notes that are not in dispute. Only Exhibit 4 addresses the issue of the validity of the Presidential Decrees, and tangentially the authority of the Defendants to issue the notes. The article notes that the Worker's Developmental Party Fraction had declared that 171 Presidential and Ministerial Decrees issued between 1988 and 1998 had been tainted with "corruption, collusion and nepotism." However, the Presidential Decrees, at issue here were promulgated in the 1970s. While it may be notable that the Indonesian government engaged in corrupt activities in the 1980s, when the unauthorized notes were issued, this does not affect the Courts holding that under the Presidential Decrees the notes were unauthorized, the Defendants do not fall within the commercial exception to the FSIA, and the Defendants are therefore immune to suit.

IV. CONCLUSION

Notwithstanding the long history of this case, the Court has never progressed beyond the issue of whether it has jurisdiction to hear the claim. Under, the FSIA, sovereign states are granted immunity from suit for their actions, except where the state has been involved in duly authorized commercial activities. Had the Republic of Indonesia authorized the NDSC to issue notes, this Court might have jurisdiction. However, as explained in the Order of March 31, 1999, Indonesian law did not authorize the issuance and this Court does not have jurisdiction. Nothing offered by the Plaintiff suggests otherwise.

Accordingly,

IT IS ORDERED that Defendants' October 22, 1999, Motion to Strike Plaintiff's Supplemental Exhibits to the Memorandum on Remand Regarding Authority is DENIED. IT IS FURTHER ORDERED that Plaintiff's April 9, 1999, Motion for New Trial (Motion for Reconsideration) Pursuant to Rule 59 is DENIED. Per the Court's Order of March 30, 1999, this case is DISMISSED WITH PREJUDICE.

DATED this 4th day of February, 2000.

/s/ WILLIAM D. BROWNING
William D. Browning
Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15459
CT/AG#: CV-94-00746-WDB

CURTIS A. PHANEUF, a single man
Plaintiff-Appellant,
v.

GOVERNMENT OF INDONESIA, A FOREIGN STATE; THE REPUBLIC OF INDONESIA DEFENSE SECURITY COUNCIL, AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE; H. A. MAWARDI, AMBASSADOR REPUBLIC OF INDONESIA,
Defendants-Appellees.

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered: September 13, 2001

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. Section 1330 of Title 28 of the United States Code provides, in relevant part:

   § 1330. Actions against foreign states

   (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

2. Section 1604 of Title 28 of the United States Code provides:

   § 1604. Immunity of a foreign state from jurisdiction

   Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter.

   (Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

3. Section 1605 of Title 28 of the United States Code provides, in relevant part:

   § 1605. General exceptions to the jurisdictional immunity of a foreign state

   (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . . .

APPENDIX F

UNITED STATES DISTRICT COURT
S.D. New York

No. 95 CIV. 9663(AGS)
Oct. 14, 1997.

ERNEST JO. STORR AND STORR INGENIERBURO,
Plaintiffs,
v.
NATIONAL DEFENCE SECURITY COUNCIL
OF THE REPUBLIC OF INDONESIA—
JAKARTA AND THE REPUBLIC OF INDONESIA,
Defendants.

OPINION AND ORDER

SCHWARTZ, District J.

Plaintiffs Ernest Jo. Storr and Storr Ingenierburo (collectively "Storr") bring this action to compel the payment of promissory notes allegedly issued by defendant National Defence Security Council of the Republic of Indonesia—Jakarta ("NDSC"), an agency or instrumentality of defendant Republic of Indonesia ("Indonesia").

Before the Court is defendants' motion to dismiss all claims in the complaint pursuant to Rules 12(b)(1), (2), (3), (5), and (6) of the Federal Rules of Civil Procedure on the grounds that this Court lacks subject matter jurisdiction over Storr's claims and personal jurisdiction over either defendant, that venue is improper, that service of process was insufficient, and that the complaint fails to state a claim on which relief may be granted; and pursuant to the doctrine of *forum non conveniens*. For the reasons set forth below, defendants' motion to dismiss is granted.

FACTS [1]

Storr holds two promissory notes allegedly issued by the NDSC. (Am.Compl. ¶¶ 7-8.) These notes are part of approximately 505 promissory notes created by several then-members of the NDSC and valued at over three billion U.S. dollars. (Def.Exh. D13.) The notes bear the signatures of two NDSC deputies and the NDSC crest. (Def.Exh. B10.) The principal maker of the notes, Ibnu Hartomo, traded the purported NDSC notes for promissory notes issued by Hassan Zubaidi, a Syrian-based financier. (Def.Exh. D13.) In August 1985, Chalid Mawardi, then Indonesia's ambassador to Syria, participated in a signing ceremony in Damascus. (*Id.*) At the ceremony Mawardi purportedly confirmed that Hartomo represented the Indonesian government and that the "NDSC notes" were "Official/Governmental." (*Id.*) Zubaidi's notes were later discovered to be worthless. (*Id.*)

The Republic of Indonesia claims that it had no knowledge of the "NDSC notes" until late 1985, at which time it promptly determined that these notes were unauthorized and invalid under Indonesian law. (Tirtonegoro Aff. ¶¶ 9-10.) In January 1986, the NDSC's Secretary General informed Bank Indonesia that neither the NDSC nor any of its officials had authority to issue promissory notes and that the "NDSC notes" were invalid. (Def.Exh. B2.) Bank Indonesia then sent communications to financial institutions advising that Indonesia had detected unauthorized promissory notes allegedly issued by nondepartmental agencies. (Def.Exh. B3-5.) In April 1987, the NDSC issued a press release which disavowed NDSC responsibility for the notes, stating that responsibility lay with the persons who signed the notes. (Def.Exh. B6.) Bank Indonesia has continuously refused to honor the notes. (Tirtonegoro Aff. ¶ 8.)

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[1] The relevant undisputed facts discussed herein are drawn from the allegations of the complaint or otherwise reflected in the record, including the affidavits and exhibits submitted by the parties.

In 1990, Storr was employed as a subcontractor to help build a hospital in Indonesia. (Pl. Mem. at 1.) In connection with this employment, Storr received from the general contractor two "NDSC notes." (Pl. Mem. at 2.) Each note was payable in the sum of $2.8 million U.S., at New York, on November 15, 1990. (*Id.*) Storr has apparently been unable to redeem the notes. (Am.Compl.¶ 9.)

Storr brings this action to enforce payment on the notes in his possession. He filed the complaint on or about November 14, 1995. On or about April 1, 1997, defendants filed the instant motion to dismiss based, *inter alia*, on lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). Defendants contend, in addition, that (1) they do not have the requisite minimum contacts with the forum to support personal jurisdiction, (2) plaintiff failed to serve process in accordance with the FSIA, (3) venue is not proper in the Southern District of New York, (4) the complaint fails to state a claim on which relief may be granted, and (5) the doctrine of *forum non conveniens* mandates dismissal. Because we find that this Court lacks jurisdiction to entertain this action, we do not reach the additional contentions.

DISCUSSION

The FSIA is the sole basis of subject matter jurisdiction over suits against a foreign state. *Argentine Republic v. Amarada Ness Shipping*, 488 U.S. 428, 434-39, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989).[2] Under the FSIA, foreign states are immune from suit unless one of the enumerated exceptions to the Act applies. 28 U.S.C. §§ 1330, 1604-05. The parties thus seem to agree that the FSIA bars this action unless defendants carried on "a commercial activity . . . that causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Defendants concede that had they, in fact, issued the promissory notes, they would come under this exception and would be amenable to suit. The entire question, then, boils down to whether defendants can be considered to have issued the notes.[3]

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[2] A "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality" of a foreign state is defined as an entity:

> (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof . . . and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b).

We turn first to the question of whether the signatories possessed actual authority to issue the notes. Plaintiff has offered no evidence to rebut defendants' extensive documentation that the NDSC had no legal authority to issue debt instruments. Only the Ministry of Finance and Bank Indonesia are authorized to incur sovereign debt. (Kantaatmadja Decl. ¶ 6; Tirtonegoro Aff. ¶ 7.) The NDSC, as a non-departmental institution, is specifically prohibited from seeking or accepting foreign credit. (Kantaatmadja Decl. ¶¶ 8, 13.) Plaintiffs unsupported argument that the signers of the notes had been authorized to do so by the Secretary General of the NDSC, even if true, is unavailing, as the Secretary General himself lacked any legal authority to approve such an issuance.[4] Plaintiff has raised no serious claim of actual authority.

The Republic of Indonesia is a foreign state and the NDSC meets the definition of an "agency or instrumentality" of a foreign state.

[3] This would appear to be a factual issue precluding dismissal at this early stage in the proceedings. But "[o]n a motion under Fed.R.Civ.P. 12(b)(1) challenging the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." *Antares Aircraft v. Federal Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir.1991), *vacated on other grounds*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), *re aff'd*, 999 F.2d 33 (2d Cir.1993).

[4] We note, in addition, the matter of the notes' appearance. Authentic notes issued by the Republic of Indonesia are multi-page documents,

The more interesting question, to which we now turn, is that of apparent authority. We note first that there is some dispute as to whether apparent authority can ever suffice to confer jurisdiction over a sovereign under the FSIA. The Ninth Circuit, in a case involving the same series of "NDSC notes," has held that only actual authority will do, basing its view on statutory interpretation of the FSIA.[5] *See Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 307-08 (9th Cir.1997). Additionally, defendants maintain that Indonesian law must be applied to determine the legality of the notes (Def. Br. at 10-11), and that the relevant Indonesian law does not recognize apparent authority.[6]

In *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda*, 877 F.2d 189 (2d Cir.1989), the Second Circuit was confronted with a promissory note obligating the government of Antigua, signed *ultra vires* by its ambassador to the United

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containing very specific details including the terms of the loan, the payment agent and place of payment, the exact amount and method of repayment, the interest terms, and the procedures in case of default. (Def.Exhs.B8, B9.) The purported NDSC notes, on the other hand, are single-page documents containing none of the details set forth *supra*. (Def Exh. B10.)

[5] In *Phaneuf*, the plaintiff held several "NDSC notes" which appear to be identical to those involved in the instant case. The Ninth Circuit relied upon what it considered to be the plain meaning of the phrase "commercial activity of the foreign state" contained in the FSIA exception: that if "the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state.'" *Phaneuf*, 106 F.3d at 308. The Court went on to state that "[i]f Congress had intended the commercial activity exception to apply to an agent's acts committed without actual authority it could have so indicated in the language of the exception." *Id.*

[6] Defendants rely upon ¶¶ 18-19 of the Komar Declaration for this proposition. We read ¶ 19 to state quite the opposite of what defendants maintain, in that it appears to support the existence in Indonesian law of the concept of apparent authority. We need not belabor this matter, as it is of no consequence to the outcome of this action.

Nations. The stated purpose of the loan was to pay for renovations to Antigua's Permanent Mission to the U.N., but in fact, the ambassador had invested the money in a casino. The Court, assuming without deciding that New York law governed the loan transactions, *see First Fidelity*, 877 F.2d at 194 n. 3, held that the government of Antigua would be liable if it had invested the ambassador with apparent authority, *see id.* at 195, and remanded for further findings in that regard. The Court concluded that apparent authority was sufficient to bind the government based upon the agency law of developed states, and in particular that of the United States, which recognizes apparent authority. *Id.*at 193.

The Second Circuit noted that there are two requirements to a finding of apparent authority. First,

> a principal causes his agent to have apparent authority by conduct which, reasonably interpreted, causes third persons to believe that the principal consents to have an act done on his behalf. . . . A decision whether apparent authority exists thus requires a factual inquiry into the principal's manifestations to third persons.

First Fidelity, 877 F.2d at 193.

Second, "the circumstances of the transaction must be examined to determine whether the person relying on the apparent authority fulfilled his 'duty of inquiry.'" *Id.* at 194.

We find that the transactions in the instant case satisfy neither of these requirements. Plaintiff alleges no specific conduct on the part of the NDSC which would lead third persons to believe that the signatories of the notes had the authority to issue them. Plaintiff relies simply on the fact that Indonesia appointed the errant deputies and the Ambassador to Syria to their respective positions. Although the Second Circuit has recognized that "[t]he appointment of a person to a position with generally recognized duties may create apparent authority," *id.*, plaintiff offers no evidence to the effect that the "generally recognized duties" of the deputy or of the ambassador included issuing and/or confirming promissory notes.

We also find that plaintiff did not fulfill his duty of inquiry, and that his alleged reliance upon the authority of the deputies to issue the notes was not reasonable. Under New York law, a third party has a duty to inquire into the scope of the agent's authority where the transaction is extraordinary or novel, or where "the facts and circumstances are such as to put him on inquiry." *Herbert Constr. Co. v. Continental Ins. Co.*, 931 F.2d 989, 996 (2d Cir.1991). There is no question that the circumstances of this transaction [7] were extraordinary.

Furthermore, even a minimal inquiry would have revealed that Indonesia and the NDSC had been steadfastly repudiating the notes for several years prior to plaintiffs acceptance. Plaintiff accepted the notes in 1990. (Pltf.Exh. 1, ¶ 3). In 1986, the Secretariat General of the NDSC had directed Bank Indonesia to issue notices that the "NDSC notes" were invalid. (Def.Exh. B2.) Twice in 1986 and once in 1987, Bank Indonesia had alerted all banks doing business in Indonesia that only the Department of Finance and Bank Indonesia were authorized to issue promissory notes. (Def.Exhs.B3-5.) And in 1987, the Secretariat General of the NDSC had issued a press release stating that the NDSC "has never issued or circulated promissory notes and has no right to do so on any grounds whatsoever . . . ." (Def.Exh. B6.)

In sum, we find that the signatories of the promissory notes possessed neither actual nor apparent authority to issue them.

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[7] For instance, plaintiff accepted signed-over governmental promissory note for work on a non-governmental project, rather than a more usual form of payment such as cash or check. (Pltf.Exh. 1, ¶ 3.) Payment from an Indonesian foundation to a German national was to be in United States dollars, payable through no particular agent and at no specific address, other than "New York." (Def.Exh. B 10.)

Neither Indonesia nor the NDSC engaged in "a commercial activity . . . that causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The commercial activity exception to the FSIA thus does not apply. We therefore find that this Court lacks subject matter jurisdiction to consider plaintiffs claims. We do not reach defendants' other proffered grounds for dismissal.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted. The Clerk of the Court is directed to enter judgment for the defendant on all claims. The Clerk shall thereafter close the file in this action.

SO ORDERED.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 97-9430
Sept. 22, 1998.

ERNEST JO. STORR AND STORR INGENIERBURO,
Plaintiffs-Appellants,

v.

NATIONAL DEFENSE SECURITY COUNCIL OF THE REPUBLIC OF INDONESIA-JAKARTA AND THE REPUBLIC OF INDONESIA,
Defendants-Appellees.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA2 s 0.23 for rules regarding the citation of unpublished opinions.)

Appeal from the United States District Court for the Southern District of New York.

Appearing for Appellant: Abner P. Slatt, Slatt & Lane, N.Y., N.Y.

Appearing for Appellees: Carolyn B. Lamm, White & Case, Washington, D.C.

HONORABLE AMALYA L. KEARSE, Circuit Judges, HONORABLE RICHARD CONWAY CASEY, District Judge [*]

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[*] Honorable Richard Conway Casey, of the United States District Court for the Southern District of New York, sitting by designation.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. Whether applying the law of New York, as the district court did, or federal common law, *see First National City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 622 n. 11, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("matters bearing on the Nation's foreign relations should not be left to divergent and perhaps parochial state interpretations") (internal quotation marks omitted), we affirm substantially for the reasons stated in Judge Schwartz's Opinion and Order dated October 9, 1997.

We have considered all of plaintiffs' contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.